Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

JOSE ANTONIO LOZANO

AND

PROPERTY 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON

CLAIMANT- PETITIONER

V

UNITED STATES OF AMERICA

PLAINTIFF-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jose Antonio Lozano
Proceeding Pro-Se
BOP # 19074-057 (B-10)
3700 Wright Avenue
Big Spring, Texas 79720

11 pp

QUESTIONS PRESENTED

1. When deciding a motion for summary judgment in a civil forfeiture action *in-rem* against a community property pursuant to 21 U.S.C. § 881 (a) (6), can the District Judge make a credibility determination weighing the evidence and draw legitimate inferences from facts, or are those jury functions in light of *Anderson v. Liberty Lobby Inc., 447 U.S. 242 (1986)* and *Reeves v. Sanderson Plumbing Prod. 530 U.S. 133 (2000).* Did the District Court's determination to review the record taken as a whole and draw all inferences " in favor of moving party" is adequate contrary to and in disregard of *United States v Diebold Inc., 369 U.S. 654 (1962)* and *Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574 (1986).* Did the District Court err in granting summary judgment motion, when in light of the entire record, a genuine issue of material fact existed under the doctrine of *Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).*

2. Did the Civil Asset Forfeiture Reform Act (CAFRA) 2000, which included a change favorable to claimant with respect to burden of proof, apply only to forfeiture actions "commenced" on or after the Act's effective date, or apply retroactively under the doctrine of *Langraf v USI Film Products, 511 U.S. 244 (1944).*

No definition is given to what it means for forfeiture to be "commenced". Does that mean the commencement of a new proceeding in a case vacated and remanded?

3. Did the "net worth" theory, traditionally applied in tax evasion and criminal cases, apply to civil forfeiture action *in rem*, despite the fact that the defendant is technically the res not the claimant? Can the government rely upon the "net worth" theory without opening the entire "tax books" contrary to, and in disregard of, *Holland v. United States, 348 U.S. 121 (1954)?*

4. Did the District Court err in applying the "circumstantial evidence" standard rather than the "substantial connection" standard, a long well settled precedent of the Fourth Circuit with Congress' intention when it enacted Title 21 U.S.C. 881?

LIST OF PARTIES

A list of all parties to the proceedings in the Court whose judgment is the subject of this petition is as follows:

1. Petitioner consists of Jose Antonio Lozano, who is a Federal inmate proceeding *pro-se.*

2. Lynne P. Klaver is the Assistant U.S. Attorney representing the Government.

3. Hill Top Farm Limited, a Texas Limited Partnership, Claimant.

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I
OPINION BELOW

The opinion of the Court of Appeals is attached as Appendix "A" and is unpublished. The opinion of the District Court of the Middle District of North Carolina appears at Appendix "C" and is also unpublished.

II
JURISDICTION

The District Court has original jurisdiction pursuant to 18 U.S.C. § 3231. The Petitioner gave Notice of Appeal Appendix " B", within the time allowed by Fed. R. App. 4 (a) (1). The Court of Appeals has jurisdiction to review final decisions of the District Court pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1), 18 U.S.C. § 2101, Article III of the Constitution of the United States, Rule 13.1 and 28 U.S.C. § 1651 (a).

III
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions which are of great significance in this petition. (1) the Seventh and Fifth Amendments of the Constitution, (2) Titles 21 U.S.C. 881 (a) (6), 18 U.S.C. 983 (c), and 19 U.S.C. 1615, and (3) Rule 56 (c) (e) and (g) of the Federal Rules of Civil Procedures.

IV
STATEMENT OF THE CASE

On January 6, 1998, the government filed a verified Complaint of Forfeiture *in rem* against Petitioner's residence [App. "O"] alleging that either the property was used or was intended to be used to facilitate drug offenses or was purchased with drug proceeds in violation of 21 U.S.C. § 881. Petitioner, an inmate proceeding *pro-se,* filed a claim to the property alleging that he had purchased the property with legal funds. [App. "N"].

On August 11, 1999, the government filed a Motion to Strike Petitioner's claim for failure to respond to its discovery request even when Petitoner was responding in good faith and producing documents [App. "M"]. On February 11, 2000, the government requested an Entry of Default as to all persons and entities. On February 15, 2000, the Clerk granted the government's request [App. "L"].

On February 25, 2000, the government filed a motion for Final Entry of Decree and Judgment of forfeiture and a Motion for Certificate of Reasonable Cause. On March 15, 2000, the Court issued a Certificate of Reasonable Cause for forfeiture as well as a Final Decree of Judgment. On May 15, 2000, Petitioner appealed the Court's Final Judgment [App. "K"]. While the case was on Appeals Matters on April 25, 2000, Congress passed "remedial legislation". The new legislation changes and raises the government's burden of proof by requiring the government "to establish, by a preponderance of the evidence, that the property is subject to forfeiture". On January 2, 2001, the U.S. Fourth Circuit Court of Appeals vacated and remanded the case for Expansion of the Record [App. "J"].

On March 29, 2001, the District Court held a status conference and issued an Order, ordering the re-opening of discovery and that the parties shall have up to and including June 29, 2001 within which to complete Discovery, thereafter, the parties shall have thirty (30) days within which to file any Summary Judgment motions.[1] On July 10, 2001, Petitioner filed a Motion to modify the order and a Motion requesting a transcript of the Status Conference held on March 29, 2001.

On August 9, 2001, Petitioner filed a Motion to Adopt New and Applicable Civil Asset Forfeiture Reform Act (CAFRA) 2000, and to proceed according to it's general rules for Civil Forfeiture

proceedings [App. "I"]. On August 31, 2001, while Petitioner's motion was unresolved and discovery still pending, the government filed a Motion for Summary Judgment with Exhibits A-L. Notwithstanding the untimeliness of such motion, on September 17, 2001, Petitioner responded to the government's Summary Judgment Motion, including Petitioner's Exhibits A-G contending *inter alia* that said motion was prematurely filed and discovery was still pending [App. "G"].

On September 19, 2001, the District Court issued an Order granting the Motion to Modify Order extending the discovery proceedings until December 20, 2001, and to file (if any) Summary Judgment Motions within 30 days thereafter. The Court set a trial date for on or after February 1, 2002. Within the same Order, the Court denied Petitioner's Motion to Apply CAFRA, 2000, and for a Transcript of Status Conference held on March 29, 2001 even when such transcript was relevant and an essential part of the discovery process [App. "I"]. On October 5, 2001, Petitioner filed an Interlocutory Appeal from the denial of the application of CAFRA 2000 and the transcript of the Status Conference. The U.S. Court of Appeals dismissed Petitioner's appeal for lack of jurisdiction because the Order was not appealable [App. "H"]. However, at the final forfeiture judgment, the U.S. Court of Appeals did not adjudicate this issue even though Petitioner re-appealed the issues. [App. "B"].

On November 10, 2001, Petitioner filed a Set of Interrogatories and Production of Documents to the government. Because the government did not respond within the time prescribed by Rules 33 and 34 of the Federal Rules of Civil Procedures on January 7, 2002, Petitioner filed a Motion with Memorandum in Support to Sanction the government for failing to comply with the aforementioned Rules. The Court denied Petitioner's Motion.

On January 18, 2002, Petitioner filed a Motion for Summary Judgment to the government with Exhibits A-G without the benefit of his discovery requests because the government did not respond to said request. On January 25, 2002, the District Court issued an Order directing the government to respond to the petitioner's Discovery requests on or before January 31, 2002, and that any Amendment necessitated by the delivery of the discovery shall be filed on or before February 28, 2002. The Court reset the trial for June 3, 2002, and ordered the government to return Petitioner to that District for

trial in sufficient time to allow the Petitioner to appear one week prior to the commencement of the trial [App. "F"]

On February 12, 2002, the government eventually responded to Petitioner's Interrogatories and Production of Documents. However, the government objected to most of the interrogatories and requests for Production of Documents, alleging *inter alia* that the documents requested were privileged internal official information and that Petitioner did not "define" the word statement in his discovery request [App. "I"]. Consequently, Petitioner filed a Motion with Memorandum in Support to compel the government to make the disclosures required by Rules 26, 33, and 34. On March 13, 2002, the Court denied Petitioner's Motion to Compel and enlarged the time to file any necessary amendments in preparation for trial to March 28, 2002. [App. "E"]

On April 1, 2002 Petitioner filed a Motion *in limine* seeking to exclude evidence not so disclosed by the government during the discovery proceedings. Shortly thereafter, Petitioner filed a request for *voir dire* questions, application for witness subpoena, requesting a subpoena be issued for Earnest J. Peace Esq.[2], an application and Affidavit to proceed *in forma pauperis*, a request for jury instructions and a Motion for Appointment of Counsel to represent Petitioner at trial.

On May 10, 2002, Petitioner was transferred from F.C.I. Texarkana, Texas to the North Carolina facilities, (County Jail) for preparation for his trial, and was housed in a 21 hour lock down County jail system without access to his legal materials. On May 17, 2002, the District Court issued a Final Judgment and Memorandum Opinion granting a Summary Judgment Motion in favor of the government and denying Petitioner's Summary Judgment Motion without conducting a trial by jury or any pre-trial hearing. In it's Memorandum Opinion, the Court improperly drew all inferences "in favor of the government" (the moving party) viewing the facts most favorable to the moving party. In addition, the Court made credibility determinations weighing the evidence from the facts. The Court granted the Summary Judgment Motion in favor of the government even when the record taken as a whole depicted a genuine issue of material fact properly for trial by jury. [App. "C"]

On May 28, 2002, Petitioner filed a Notice of Appeal to the U.S. Court of Appeals because he was unable to file any other reme-

dial motion to the District Court due to his status of confinement. On September 18, 2002, the Court of Appeals affirmed the judgment "on the reasoning of the District Court". The Court of Appeals did not exercise it's authority by reviewing the case on the de novo standard for review [App. "A"]. Consequently on December 13, 2002, Petitioner filed a Motion for Access to Original Record and State of Mandate pending application for a writ of certiorari.

On February 11, 2003, the Court of Appeals denied Petitioner's petition for rehearing and rehearing *en banc* as well as his Motion to Stay the Mandate and Motion for Access to Records. On February 20, 2003, the Court of Appeals nevertheless, reconsidered Petitioner's Motion for Stay of Mandate, granting the Motion until either the expiration of time to file a petition for a Writ of Certiorari with the Supreme Court, or the Supreme Court decision on such a petition. [App. "A"]

V

REASON FOR GRANTING THIS WRIT

1. SUMMARY JUDGMENT

Various decisions of this Court dealing with Summary Judgments have constantly held that "a genuine issue as to material fact" precludes entry of summary judgment. *Adickes v S.H. Kress & Co., 398 U.S. 144 (1970); Anderson v Liberty Lobby Inc., 447 U.S. 242 (1986).* In this recent case, there was a general issue as to material fact" within the meaning of Rule 56 of the Federal Rules of Civil Procedures. Because of the presence of "genuine issue of fact" and supporting Affidavits, the Court erred in granting the Summary Judgment Motion if favor of the government. In light of the entire record, this case should go to trial as a matter of law. Petitioner's *prima facie* claim to his property, combined with sufficient evidence supported by sixteen (16) affidavits, including his own affidavit, as well as a number of relevant exhibits, created a genuine issue of material fact in dispute as to whether he built his home with illegal proceeds, illustrating his case for trial and rendering Summary Judgment inappropriate.

The government failed to carry it's initial burden under Rule 56 (c) of demonstrating the absence of a genuine issue of material fact in light of the doctrine announced in *Adickes v S.H. Kress*. It is well settled that the burden is on the government as the "moving

party" to demonstrate the absence of any genuine issue of material fact. If the "moving party" fails to meet it's initial burden of demonstrating absence of genuine issue of material fact, the summary judgment motion must be denied. *Little v Liquid Air Corp., 37 F.3d 1069 (5th Cir. 1994).* Likewise, the facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Petitioner as the moving party opposing the motion. *United States v Diebold 369 U.S. 654 (1962).*

The moving party is in a favorable posture, being entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf, and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered." *Charbonnages de France v Smith 597 F. 2d 414 (4th Cir 1979).* This Court is obligated to credit the factual assertions contained in the material before it which favor the party resisting summary judgment and to draw inferences favorable to that party if the inferences are reasonable (however improbable they may seem). *Bartram v Wolfe 152 F. Supp 2d 898 (S.D. W. Va. 2001); Scott v Grenville County 716 F.2d 1409 (4th Cir. 1983)*

Thus summary judgment under Rule 56 should be granted only where it is perfectly clear that there is no dispute about either the facts of the controversy or the inferences to be drawn from such facts. *Diebold,* supra; *FLI-Back Co., Inc. v. Philadelphia Mgrs. Mut Ins. Co. 502 F. 2d 214, 218 (4th Cir. 1974); Stevens v Howard D. Johnson Co., 601 F. 2d 139 (4th Cir. 1979).* Even though there may be no dispute about the basic facts, "still summary judgment" will be inappropriate if the parties disagree on the inferences which may reasonably be drawn from those disputed facts, or even where a direct verdict would be proper after hearing the evidence, the District Court should not try the case in advance by summary judgment. *Pierce v Ford Motor Co., 190 F. 2d 910 (4th Cir. 1951)* cert. denied *342 U S 887.* Applying this standard here, it is apparent that the government was not entitled to summary judgment as a matter of law.

2. <u>FACTS AND INFERENCES</u>

The heart of the government's forfeiture complaint was the declaration of U.S. Customs Agent Jack A. Barnwell ("Mr.

Barnwell"). In fact, Mr. Barnwell's declaration was the only affidavit submitted by the government in support of its motion for summary judgment. In it's Memorandum Opinion, the Court credited the inference on the government relying upon the declaration of Mr. Bardwell. The Court accepted as a truth that while interviewing Petitioner, he admitted that he had started dealing drugs in 1994 and had used the drug proceeds to purchase some of the materials used to build his home at 3714 Cancun Loop, even when Petitioner disputed those facts with evidence [App. "C"].

Mr. Barnwell's perjured declarations were vigorously challenged by Petitioner. Attorney Ernest J. Peace ("Mr. Peace"), who represented Petitioner during such interview, submitted an Affidavit contradicting Mr. Barnwell's declaration. For instance, in paragraph "5" of the Affidavit, Mr. Peace affirmed the following:

"Mr. Lozano insisted that he built his home with legal assets for the shelter of his family. He never admitted that he used illegal proceeds to build his home."

This statement made by Mr. Peace in his "sworn affidavit", utterly contradicts Mr. Barnwell's declaration, and the Court erred in accepting this declaration as a truth ignoring paragraph "5" of Mr. Peace's affidavit [App. "D"]. These two conflicting declarations create a "genuine issue of material fact in dispute as to whether Petitioner admitted using illegal proceeds to purchase the building materials for the construction of his home.

Mr. Barnwell also declared that while interviewing Marta Pena, "the bookkeeper" of Petitioner's business Fiesta Tires, she stated that the business never made a profit. Petitioner produced documentation reflecting that Fiesta Tires' employment tax records were book kept by Irma D. Miller, a Corp. Officer. Petitioner produced evidence that Marta Pena never worked for Fiesta Tires. Thus, Mr. Barnwell's declaration was refuted by Mr. Peace's affidavit and the tax records provided by Petitioner. The District Court however, drew all inferences in favor of the government, ignoring the reliability of Mr. Barnwell's declaration and the facts in dispute.

When the "nonmovant" party presents direct evidence, that if believed by the jury, would be sufficient to win at trial, summary judgment is not appropriate even where "movant" presents conflicting evidence. A jury might well believe the testimony of Mr. Peace

which contradicts Mr. Barnwell's declaration. Since the government's forfeiture argument rested largely on the declaration of Mr. Barnwell, Petitioner should have had an opportunity to cross-examine Mr. Barnwell and Marta Pena to test the credibility of their statements. In these circumstances, the jury should be given the opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose state of mind are at issue.

For these reasons, summary judgment was incorrectly awarded to the government. Petitioner's arguments conflicted, rather than coincided, with those of the government. A trial exists to resolve what reasonable minds would recognize as real factual disputes. *Cole v Cole 633 F. 2d 1083 (4th Cir. 1980); Atlantic States Construction Co v Robert E. Lee & Co. 406 F. 2d 827 (4th Cir. 1969).* Although summary judgment is an effective tool for District Courts to manage their caseload, they must avoid temptation to use summary judgment as an abbreviated trial. *American Intern. Adjustment Co. v Galvin 86 F. 3rd 1455 (7th Cir. 1996).* When facts support plausible but conflicting inferences on pivotal issues in a case, the Judge may not choose between those inferences at summary judgment. *Stage, Coyne v Taber Partners I 53 F.3rd 454 (1st Cir. 1955).* If reasonable minds could reach different conclusions and inferences from the evidence, the Court must submit the case to the jury.

A. NET WORTH THEORY

The government inferred the "net worth theory" to Petitioner's case, and the Court drew all those inferences in its favor, even when there were conflicting inferences. In it's Memorandum Opinion, the Court accepted as truth that Fiesta Tires suffered a net loss for 1996 of approximately $48,000. In doing so, the Court relied on the tax and accounting records produced by the government from Fiesta Tires. The Court, improperly and erroneously, relied on an unreported and incomplete tax accounting records. Fiesta Tires was primarily a tire sale shop, but it also offered auto body painting, a car wash, and a mechanics shop, and the Court accepted this as truth. Nevertheless, the tax accounting records produced by the government only reflected the sales of single tires. It is important to explain that Petitioner lost Fiesta Tires after he was incarcerated in 1997 and all the sales documents associated with it.[3]

However, Petitioner proved with factual evidence, that Fiesta

Tires did not suffer a "net loss', and that the government's accounting tax figures were wrong. Petitioner produced "Affidavits of personal Knowledge" supporting his position. He produced an affidavit from Gene Reney, (Reney's Enterprises), a tire supplier, stating that he sold a number of truckloads of tires to Petitioner during the years of 1996-1997 in the amount of $5,800.00 per load and that Petitioner sometimes sold those loads hand to hand to other persons. Mr. Reney declared that petitioner still owes him $18,000.00 from those sales. Petitioner produced an affidavit from Roberto Garza of Beto's Junk Yard, who had operated his business for over twenty (20) years. Mr. Garza declared that he sold a number of used wrecked cars to Petitioner who in turn fixed and sold them to the public. Mr. Garza also declared that he sold a number of transmissions, motors, and other used auto parts to Petitioner for his mechanic's shop at Fiesta Tires. In addition, Petitioner produced an affidavit from Alejandro Cardenas, Manager of Lozano's Body Shop, who had worked side by side with Petitioner during the years of 1993 and 1994 and 1995. Mr. Cardenas also declared that he helped petitioner in body repairing and painting cars at Fiesta Tires in 1996 and part of 1997. These activities were not projected in the governments "tax accounting figures" because such figures were incomplete and unreported.

In it's Memorandum Opinion, the Court accepted as true, the government's inference that Fiesta Tires' net loss for 1996 was $48,000.00. The Court ignored Petitioner's affidavits submitted by uninterested persons based upon their "personal knowledge". Where competing affidavits focus on material issues, the District Courts may not decide. It is the very purpose of the trial to establish which party's version of the contested circumstances best comports the reality.

B. HOLLAND'S DOCTRINE

With the government using the "net worth" method of proof, the Court found that Petitioner built his home with illegal proceeds. In doing so, the Court opined that under the "net worth theory", the Court is allowed to presume that a claimant's expenditures in excess of legitimate sources of income are from illegitimate sources of income, in the absence of any explanation reasonably susceptible to being checked. This opinion is simply without merit. Petitioner

indeed produced "official documents" susceptible to being checked. The Court unjustly ignored such documents showing Petitioner's legal income.

Petitioner produced a copy of a document, "Pension Benefit Guaranty Corporation", (a U.S. Government Agency), showing his legal income from 1988 to 1991. He also produced a copy of the buy and sell contract of his prior house[4] (officially stamped by the State of Texas, Webb County Clerk) including a photograph of the house. Petitioner's ex-wife Sanjuanita G. Serna, submitted an affidavit stating that she granted their prior house to Petitioner as a pre-agreement to their divorce and that she had helped him with her income during the marriage. Petitioner also produced official documents (stamped by the State of Texas, Webb County Clerk) showing the sale of his prior business, Tony's Video. He received $17,000.00 from the sale of that business. Petitioner also produced copies of his income tax return Form 1040, for 1993, 1994, and 1995 which reflected $59,000 "net earnings" during those years. In addition, Petitioner produced a affidavit from his brother Francisco Lozano, declaring that he loaned $5,000 to his brother for building materials. In sum, the "net income" produced by Petitioner with factual evidence, reflected $103,000 during 1993, 1994, and 1995.

The District Court failed to include in it's opening "net worth" figures $ 44,000 of currency accumulated before 1993. The government did not dispute this claim. The Court also failed to include in it's opening "net worth" figures, the sale of truckloads of tires, the sales of repairing and painting cars, and the "net earnings" of the mechanical auto repairs at Fiesta Tires from 1996 to 1997. The "net worth" technique used in this civil forfeiture action *in rem*, was an improper method of accounting, and it's use violates the Due Process Clause.

Traditionally, the "net worth theory" was employed for purposes of tax evasion penalties. *Capone v United States 57 F 2d 609 (7th Cir. 1931), Guzik v United States 54 F. 2nd 618 (1931).* In the context of tax evasion, the U.S. Supreme Court has explicitly approved it's use, with "certain safeguards". *Holland v. United States 348 U.S. 121 (1954),* and *United States v Johnson 319 U.S. 503 (1943).* Recently the Seventh and Eighth Circuits have applied such provisions in the context of 21 U.S.C. 848 (CCE, Criminal Forfeiture), *United States v Nelson 851 F. 2nd 976 F. 2nd 1316 (7th Cir.*

1983), United States v Lewis 759 F. 2nd 1316 (8th Cir. 1985). There is no guidance in the long line of forfeiture case law supporting the application of the "net worth theory" in a civil forfeiture action *in rem.* The intent of Congress is to create a Criminal Forfeiture Statute wholly distinguished from the forfeiture permitted under the civil law. [See Federal Rules of Criminal Procedure Rule 1 (5) (B), previous Rule 54 (5), *United States v Long 654 F. 2nd 911 (3rd Cir. 1981).*] The distinguishing characteristic of a criminal forfeiture provision, is that unlike the *in rem* character of civil forfeiture, the personal guilt of the defendant is at issue. The defendant is technically the *res* not the claimant. The "net worth theory" may be well applied in criminal forfeiture or in tax evasion cases, but not *in rem* civil actions.

Additionally, for the application of the "net worth theory", the Court improperly relied upon the tax value of petitioner's home. The U. S. Supreme Court has held that statutory *in rem* forfeitures have traditionally been fixed, "not by determining the appropriate value of the property", but to determining what property has been tainted by unlawful use, to which issue the value of the property is irrelevant.[5] *Austin v United States 509 U.S. 602 (1993).* Petitioner produced a number of affidavits from construction workers, friends, and his family supporting the inference that he physically constructed his home with the minimum investment in the construction. Thus, the value of the house is irrelevant in this case, and the inference of the "net worth theory", based on incorrect circumstantial evidence tends to be improper, As *Holland* instructs us, "circumstantial evidence" may in some cases point to a wholly incorrect result.

C. CRIMINAL ACTIVITY

The District Court accepted as true the inference of the government that Petitioner and his partner John Paulette transported over 770 pounds of marijuana from Texas to North Carolina for $50.00 or $$75.00 per pound profit split between them. The record reflects otherwise. Petitioner produced exhibits, (excerpts from Haulk's trial) from testimonies of John Paulette, Harold Paulette, and Leonard Besson testifying that Petitioner was not the only supplier in the conspiracy. The "Paulette-Besson conspiracy" had over four (4) suppliers and the only amount transported to North Carolina was 700 pounds. The Court also accepted the inference that Petitioner was arrested in New York "after" selling approximately 200 pounds of

marijuana to an undercover police officer for $135,000. Petitioner was arrested "while attempting to sell the drug", not after he sold the drug. In fact, Petitioner never saw any money. He constantly disputed these facts with evidence. (Exhibits).

It is well known that the evidence of the "nonmoving" is to be believed, and all justifiable inferences are to be drawn in his favor. When the allegations of the complaint and the answers thereto raised genuine issues as to material facts, they must be resolved in a trial of the action. The Court should not have attempted to determine whether a jury could find, with a preponderance of the evidence, that the Petitioner's home was built with illegal proceeds absent direct and cross-examination of the central witnesses in the presence of the trier of facts. The record indicates that the Court reached the evidences as conclusion, and a jury could have found the facts differently and entered a different verdict. As this Court has long recognized, a jury and a Judge can draw different conclusions from the same evidence. *Railroad Co. v Stout 17 Wall, 84 U.S. 657 (1874)*

1. CIVIL ASSET FORFEITURE REFORM ACT 2000 (CAFRA)

The District Court denied the applicability of CAFRA retroactively without any opinion. The Court of Appeals did not adjudicate this issue. Petitioner maintains that Legislation, which did not take away any vested rights possessed by a party, increase liability, or attach new legal consequences to past conduct, did not implicate rationale underlying general rules against retroactive application of new statutes, and was specifically designed to remedy inequities about which claimants complained throughout proceedings at issue *Langraf v U.S. Films Products 511 U.S. 244 (1994).*

There is a conflict between the Courts of Appeals, regarding the question whether the heightened burden of proof required by CAFRA, has a retroactive effect on forfeiture cases pending in the District Court on the Act's effective date. See *United States v Real Property in Section 9, Town 29 North 241 F.3rd 796 (6th Cir. 2001)* reversing summary judgment in favor of the government in judicial forfeiture action, holding that "the act's burden of proof applies retroactively and remanding to District Court to apply CAFRA", *United States v 5 S. 351 Tuthill Road Naperville, Ill. 233 F. 3rd 1017, 1026 n. 2 (7th Cir. 2000)* reversing summary judgment which had

been granted in the government's favor in judicial forfeiture proceedings with instructions; *United States v Property at Faxon Avenue Memphis TN., 145 F. Supp 2d 942 (W.D. Tenn. 2001),* holding that a statute can be applied to pending cases when the statute is addressed to remedies of procedures and does not alter substantive rights; *United States v Forest Glen Court, Beavercreek, Ohio 162 F. Supp 2d 909 (S.D. Ohio 2001),* holding that CAFRA applies to actions which were pending at the time of the enactment, *United States v Lot Numbered One (1) of Lavaland Annes 256 F. 3rd 949 (10th Cir. 2001),* holding that where the Court of Appeals remands for a new trial, the new trial might constitute "commencement" of a forfeiture proceedings within the meaning of Section 21, such that the heightened burden of proof might be applied to the new trial.

But see *United States v. $80,180.00 in US Currency 303 F. 3rd 1182 (9th Cir. 2002)* holding that CAFRA does not apply to pending cases including further proceedings on remand; *Vereda Lida v. United States 271 F. 3rd 1367 n. 4 (Fed Cir. 2001),* holding that the act was not applicable to non-judicial forfeiture commenced in 1993; *United States v. Real Property 239 F. 3rd 78, 82 n. 3 (1st Cir. 2001),* holding that the act innocent owner defense did not apply to actions where the judicial forfeiture complaint was filed on February 3, 1998; *United States v $100,348.00 U. S. Currency 157 F. Supp 2d 1110, 1116 (C.D. Cal. 2001),* holding that the act's burden of proof did not apply to judicial forfeiture actions filed on August 22,2000.

This issue has divided the Court of Appeals. Therefore, this Court will be able to clarify it's ruling in *Langraf v USI Films Products 511 U.S. 244 (1994).* However, Petitioner maintains that the lower burden of proof on the government coupled with the heightened burden of proof on Petitioner (19 U.S.C. 1615) violates the Due Process Clause, as such 21 U.S.C. 983 (c) should be applied retroactively. As Judicial Chairman, Henry Hyde, R-Ill expressed when he introduced the Bill H.R. 1658 (CAFRA) "all I want to do is give the average citizen... due process law.

2.CIRCUMSTANTIAL EVIDENCE V SUBSTANTIAL CONNECTION

From the onset of his claim, Petitioner challenged the "substantial connection" between the criminal activity and his home. In it's Memorandum Opinion, the District Court nonetheless substituted

the "substantial connection" standard for "circumstantial evidence". The Fourth Circuit however, has a long, well settled precedent regarding the "substantial connection" test. *United States v Santoro 866 F.2nd 1538 (4th Cir. 1989); United States v 1966 Beechcraft Aircraft Model King Air 777 F. 2nd 947 (4th Cir. 1985); United States v Schifferly 895 F. 2nd 987 (4th Cir. 1998); United States v Reynolds 856 F. 2nd 675 (4th Cir. 1998).* The Legislative history supports this holding. It instructs that " it is the intent of these provisions that property would be forfeited only if there is a "substantial connection" between the property and the underlying criminal activity. Psycotropic Substances Act of Title 1 and 11 95th Congress, 2nd Session, reprinting in 1978, U.S. Cod. Cong. & Ad. News 9496,9518,9522. The standard is a common sense interpretation of the statutes which is consonant with the Congressional intent that the instrumentality of the drug trade is reached, while ensuring that property only fortuitously connected with drug trafficking is preserved. See S. Rep. No. 225 98th Congress, 1st Session 195, printed in 1984 U.S. Code Cong. & Ad. News 3182. Congress reaffirmed it's intention when enacting CAFRA in 2000. 18 U.S.C. 983 (c) (3)[6]. Public Law 106-185 Apr. 25, 2000, 106th Congress Legislative History-H R 1658.

Accordingly, the application of the "substantial connection" requirement comports with the Legislative history of 21 U.S.C. 881 (a) (6). If the word "substantial" is to be given any meaning, the "connection" between petitioner's home, and the underlying offense cannot be said to be "substantial". In view of the record, petitioner asserts that his home is not "substantially connected" to any criminal activity, and is therefore not subject to forfeiture under 21 U.S.C. 881 (a) (6). The Court never adjudicated that issue, ignoring Petitioner's argument.

VI
CONCLUSION

For the reasons set forth in this Petition, and guided by the entire record, the Court's grant of Summary Judgment was erroneous. A genuine issue of material fact existed as to whether the petitioner's home was built with illegal proceeds. The purpose of Rule 56 (c) is not to cut litigants off from their right of trial by jury if they really have issues to try. *Santon v Arkansas Natural Gas Corp 321 U.S. 620 (1944).* The District Court went beyond the traditional summary judgment inquiry weighing the inference in favor of the government. *Diebold* and *Matsushita Elec.* supra, do not stand for any such decision, therefore the Petitioner requests this Court clarify their retroactive application of CAFRA 2000 because of the split in the Circuits. Those holdings in fact undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment. As such, it may overturn well settled law. For these reasons, *inter alia*, this writ should issue.

Jose Antonio Lozano

FOOT NOTES:

[1] Petitioner didn't receive the Court's Order until June 25, 2001 (4 days before the time for discovery would have expired) even though the Clerk acknowledged Petitioner's location.

[2] Mr. Peace was the attorney that represented the Petitioner when U.S. Custom Agent Jack H. Barnwell interviewed him. Mr. Peace submitted an Affidavit contradicting Agent Bardwell's declaration which was the underlying basis for filing the forfeiture action *in rem*.

[3] Petitioner was leasing the building for Fiesta Tires, and after he was arrested he was not able to continue with such lease. Consequently, the landlord repossessed the building and innocently destroyed all the documents relevant to Fiesta Tires activities.

[4] Petitioner sold his prior house for $22,000 and invested that money for starting his new home.

[5] The question is to "not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.

[6] The government shall establish that there was a "substantial connection" between the property and the offense.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 02-1626

FILED:
FEBRUARY 20, 2003

UNITED STATES OF AMERICA,
Plaintiff/Appellee

Vs.

JOSE ANTONIO LOZANO
Claimant/Appellant

and

Property, 3714 Cancun Loop, Webb County,
Laredo, Texas, with all appurtenances and
improvements therein;
Defendants

HILL TOP FARM, LIMITED, a Texas Limited
Partnership,
Claimant

ORDER

Upon review, it is ORDERED that the Appellant's motion to stay the issuance of the mandate pending either the

expiration of time to file a petition for writ of certiorari with the Supreme Court or, if a timely petition is filed, the Supreme Court's decision on such a petition, is GRANTED.

For the Court

"s/ PATRICIA S. CONNOR'

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
FEBRUARY 20, 2003

NO. 02-1626
CA-98-11-1

UNITED STATES OF AMERICA
Plaintiff/Appellee

V.

JOSE ANTONIO LOZANO
Claimant/Appellant

and

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCE AND IMPROVEMENTS THEREON;
Defendant

HILL TOP FARM, LIMITED, a Texas Limited Partnership
Claimant

ORDER

The mandate in this case was issued prematurely. The Court recalls the mandate for further proceedings.

For the Court - By Direction

"S/ PATRICIA S. CONNER"
CLERK

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEAL
FOR THE FOURTH CIRCUIT

FEBRUARY 19, 2003

MANDATE

TO: Clerk, District Court/Agency

FROM: Pamela K. Stump
Deputy Clerk

RE: 02-1626 US v. Lozano
CA-98-11-1

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 11/13/02.

[ ] Order and Certified Copy of Judgment
[x] Opinion and Certified Copy of Judgment
[ ] Order on Costs
[ ] Order dismissing appeal R42(b) or Local Rule 45
[ ] Other: _____
[ ] The record has been retained for use in case number _____

A copy of the judgment is enclosed to counsel/pro se parties

cc: Jose Antonio Lozano
Lynne P. Klauer

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 11, 2003

NO. 02-1626
CA-98-11-1

UNITED STATES OF AMERICA
Plaintiff/Appellee

V.

JOSE ANTONIO LOZANO
Claimant/Appellant

and

PROPERTY, 3714 CANCUN LOOP, LAREDO, TEXAS; WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON:
Defendant

HILL TOP FARM, LIMITED, a Texas Limited Partnership
Claimant

ON PETITION FOR REHEARING
AND REHEARING EN BANC

The appellant's petition for rehearing and rehearing en banc motion to stay and motion for access to records were submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of

the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied. The motion to stay and motion for access to records are denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff/Appellee

V. No. 02-1626

JOSE ANTONIO LOZANO
Claimant/Appellant

and

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREOF

MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI

TO THE HONORABLE FOURTH CIRCUIT COURT OF APPEALS:

Now comes the appellant, Jose Antonio Lozano (hereinafter the appellant), proceeding through a pro-se representation and pursuant to Fed. R. App. P. 41(d)(2)(A) and Fourth Circuit Rule 41, respectfully moves this Honorable Court for an order staying the issuance of the mandate pending

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff/Appellee

V. No. 02-1626

JOSE ANTONIO LOZANO
Claimant/Appellant

and

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREOF

EMERGENCY MOTION FOR ACCESS TO ORIGINAL RECORD OR, IN ALTERNATIVE FOR INFORMATION OF CONTENTS THEREIN

TO THE HONORABLE FOURTH CIRCUIT COURT OF APPEALS:

Now comes the Petitioner-Appellant in the above-named case Jose Antonio Lozano (hereinafter "Appellant") and proceeding through pro-se representation, respectfully petition the honorable justice of this court of appeals, as an emergency matter, for entry of an order "for access to original record" or, in alternative for information of the contents therein. In support thereof show the following.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 02-1626

UNITED STATES OF AMERICA
Plaintiff/Appellee

V.

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON; AND JOSE ANTONIO LOZANO,
Claimant/Appellant

Appeal from the United States District Court for the Middle District of North Carolina at Durham

---

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

JOSE ANTONIO LOZANO
Proceeding Pro-Se
Reg. No. 19074-057 (E-Unit)
F.C.I. Texarkana
P.O. Box 7000
Texarkana, Texas 75505-7000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 02-1626

UNITED STATES OF AMERICA
Plaintiff/Appellee

V.

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON; AND JOSE ANTONIO LOZANO,
Claimant/Appellant

APPENDICES

Appendices A through F

JUDGMENT
FILED: NOVEMBER 13, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff/Appellee

V. No. 02-1626
CA-98-11-1

JOSE ANTONIO LOZANO
Claimant/Appellant

and

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON;
Defendant

HILL TOP FARM LIMITED, a Texas Limited Partnership
Claimant

Appeal from the United States District Court for the Middle District of North Carolina at Durham

---

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

UNPUBLISHED
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 02-1626

UNITED STATES OF AMERICA
Plaintiff/Appellee

V.

JOSE ANTONIO LOZANO
Claimant/Appellant

and

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON;
Defendant

HILL TOP FARM LIMITED, a Texas Limited Partnership
Claimant

Appeal from the United States District Court for the Middle District of North Carolina at Durham William L. Osteen, District Judge. (CA-98-11-1)

Submitted: November 7, 2002 Decided: November 13, 2002

Before WILKINS and LUTTIG, Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Jose Antonio Lozano, Appellant Pro Se, Lynne P. Klauser, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Jose Antonio Lozano appeals the district court's order granting summary judgment to the Government in this forfeiture action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See United States v. Lozano, No. CA-98-11-1 (M.D. N.C. May 17, 2002). We dispense with oral argument because the facts and legal court and argument would no aid the decisional process.

AFFIRMED

INFORMAL BRIEF 02-1626

1. Jurisdiction (for applicants only)

A. What is the name of the Court from which you are appealing?

U.S. District Court for the Middle District of North Carolina

B. What is the date of the order you are appealing?

May 17, 2002

2. Timeliness of appeal (for prisoners only)

When did you give your notice of appeal to a prison officer for mailing to the U.S. District Court?

May 28,2002

3. Use the following spaces to tell the U S Court of Appeals for the Fourth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded. Appellant must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. Appellees may rely on the facts and law stated in that judgment or may advance alternative grounds for affirmance or dismissal. The parties may cite case law, but it is not required.

Issue 1

The District Court erred as a matter of law in granting Government's Motion for summary judgment, notwithstanding the existence of a genuine issue of material fact in dispute.

Supporting facts and argument (See next page)

Issue 2.

The court erred as a matter of law in refusing to apply the substantial connection test well settled by this circuit, and also erred in applying the "net worth" theory in Lozano's case.

to determining what property has been tainted by unlawful use, to which issue the value of the property is irrelevant..... the question is not " how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.
Austin v United States ___U.S.__113 S.Ct. At 2815,125L.Ed 2d 488 (1993). Because of the distinct differences of the character of criminal and civil procedures, Lozano concludes that civil forfeiture In Rem case laws provided no guidance to the resolution of the question relating to the "net worth"theory. Since Holland instructs that the "net worth" method greatly increases the chances for error, this leads the Courts to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific fact in individual case. Id. Holland admitted that "circumstantial evidence" may in some cases point to a wholly incorrect result.(emphasis added). Therefore due to the facts mentioned herein, Lozano maintains that the Court erred as a matter of law in applying the "net worth" method in his civil forfeiture In Rem. Lozano further contends that if the government chose to proceed with the "circumstantial evidence"theory, in fairness of justice, it is the province of the jury to resolve the issue.

Issue 3.
The District Court erred as a matter of law in denying the application of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA)

SUPPORTING FACTS AND ARGUMENT

On 4-25-2000, Congress enacted CAFRA of 2000 while Lozano's case was on appeal. On December 29, 2000, this Court vacated the Judgment of Forfeiture as well as the entry of default, and remanded this case for expansion of the record. On August 9, 2001 Lozano

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 02-1626
CA-98-11-1

FILED: July 23, 2002

UNITED STATES OF AMERICA
V. Plaintiff/Appellee

JOSE ANTONIO LOZANO
Claimant/Appellant

and

Property, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON;
Defendant

HILL TOP FARM, LIMITED, a Texas Limited Partnership
Claimant

ORDER

Appellant has filed a request for an extension of time to file an informal brief.

The Court extends the time until August 20, 2002.

For the Court - By Direction

"s/ Patricia S. Connor"
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1626
CA-98-11-1 FILED: June 20, 2002

UNITED STATES OF AMERICA
V. Plaintiff/Appellee

JOSE ANTONIO LOZANO
Claimant/Appellant

and

Property, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON;
Defendant

HILL TOP FARM, LIMITED, a Texas Limited Partnership
Claimant

ORDER

Appellant has filed a request for stay of this appeal to access records and a law library.

An extension of time to file appellant's informal brief is granted until 8/5/02.

For the Court - By Direction

"s/ Patricia S. Connor"
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TX , WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON, (JOSE A. LOZANO)
DEFENDANT , CASE NO. 1:98CV00011

V.

UNITED STATES OF AMERICA
PLAINTIFF

NOTICE OF DEFENDANT'S STATUS

Now comes, Jose A. Lozano ("Defendant") defendant in the above named case, and proceeding pro-se, gives notice to this honorable court of his status concerning his appeal from the judgment entered the 17th day of May, 2002, by the U.S. District Court for the Middle District of North Carolina, Judge William J. Osteen.

Defendant hereby inform this court that on May 20, 2002, he filed a notice of appeal concerning the above-mentioned judgement,thereupon , on May 31,2002, defendant sent a money order for the amount of $ 105.00 and further gave notice of appeal

APPENDIX B

In the United States District Court
for the Middle District of North Carolina

3714 Cancun Loop, Webb County,
Laredo, Tx 78046 (Jose A.Lozano)
Defendant. CASE NO. 1:98CV00011

V

United ~~States of America,~~
Plaintiff

NOTICE OF APPEAL

Notice is hereby given, that defendant Jose A. Lozano, herby appeal the court for the Middle District of North Carolina issued on May 17, 2002 by the honorable William J. Osteen, U.S. District Judge. Notice is further given that defendant is in transit within the ~~prison system and he will advice the court when he would arrive at his location of~~ incarceration (F.C.I. of Texarkana, Texas).

Executed the 31st day of May, 2002.

Respectfully submitted,
JOSE A LOZANO
Jose Antonio Lozano Fed.No.19074-057
3714 Cancun Lp. ; Laredo, Tx 78046

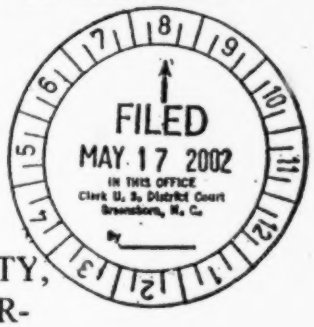
BEST AVAILABLE COPY

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff,

V. 1:98CV00011



3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,
Defendant

JOSE A. LOZANO,
Claimant

JUDGMENT

OSTEEN, District Judge

For the reasons stated in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment [61] is granted.

IT IS FURTHERED ORDERED that Claimant's Motion for Summary Judgment [75] is denied. Claimant's Motion in Limine [90], in Support of Request to Proceed In Forma Pauperis [93] are denied as moot.

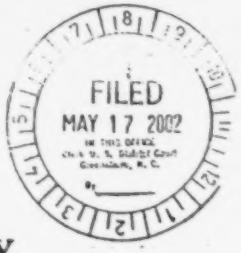
This the 17 day of MAY 2002.

"s/ William L. Osteen"
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA

Plaintiff,



V. 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,

Defendant

JOSE A. LOZANO,

Claimant

MEMORANDUM OPINION

OSTEEN, District Judge

This is a civil forfeiture action concerning real property located at 3714 Cancun Loop, Webb County, Laredo, Texas. Plaintiff, the United States (hereinafter "the Government"), seeks forfeiture of the defendant property pursuant to 21 U.S.C. 881 (a) (6), alleging that the property represents proceeds of illegal drug trafficking. Claimant Jose Antonio Lozano, the owner of the property, is proceeding pro-se in this matter.

This case is currently pending on cross-motions for summary judgment. For the reasons set forth herein, Claimant's motion will be denied, and the Government's

motion will be granted.[1]

I. FACTUAL BACKGROUND

On April 30, 1993, Claimant entered into a Contract for Deed with developer Hill Top Farms, Ltd. ("Hill Top") for the defendant property, a residential lot in the "Los Presidentes VI" subdivision of Laredo, Texas. Claimant made a down payment of $500 and agreed to pay the balance of the $22,000 purchase price plus interest in monthly installments of $260.35

Claimant began building a house on the lot at 3714 Cancun Loop in mid-1993, doing most of the labor himself. Various family members and friends of Claimant assisted in the building project. In mid-1995, when the house was approximately half completed, Claimant moved his family into their new home. Claimant finished constructing the house in 1997.

The total dollar figure invested in improvements to the property is unknown. Claimant attests that he purchased the building material for the house himself, and that some of the materials were bought in Mexico at a discounted price. However Claimant has provided no evidence, documented or otherwise, of the cost of his building materials. Claimant admits paying two subcontractors a total of $6,700 to work on the house but has provided no evidence of amounts paid (if any) to others who assisted him.

With respect to the lot itself, the record is more illuminating. Claimant had paid a total of $17,193.38 to Hill Top by June 1997, when he stopped making payments, leaving

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[1]Claimant's Application for Witness Subpoena [92], Motion in Limine [90], and Motion and Affidavit in support of Request to Proceed In Forma Pauperis [93] will be denied as moot.

a remaining balance of $18,760.78 on the contract. By June 20, 1998, when Hill Top responded to discovery, Claimant owed a total of $23,940.14, including property taxes paid by Hill Top and late payment charges.

The tax value of the property grew as construction on Claimant's residence progressed. From 1994 to 1996, the tax value of the lot was $16,880. In 1996, the improvements on the lot were valued at $52,610. In 1997, when the house was completed, the tax value of the improvements was $106,720 and the value of the lot had increased to $21,630, for a total tax value of $128,350. A photograph of the completed home is attached hereto as Exhibit A.

Claimant's income during the period of the house's construction has not been clearly established. Claimant states that in 1993 he was using space in his brother Francisco's auto shop to perform auto body work and paint work. Claimant allegedly continued working in that capacity until the end of 1995, when he opened his own business, "Fiesta Tire," in Laredo. Fiesta Tire was primarily a tire sales shop but also offered auto body paint and car wash services. Claimant registered Fiesta Tire as a partnership with the Webb County (Texas) Clerk's Office on February 28, 1996, naming Mr. John Paulette as his partner. On April 1, 1996, Claimant and Mr. Paulette incorporated their business under the name of Fiesta Tire, Inc. According to tax and accounting records produced in discovery, Fiesta Tire suffered a net loss for 1996 of approximately $48,000. Claimant did not receive wages from Fiesta Tire.

Claimant has offered no documentation of his income-producing activities other than his tax returns. Claimant's tax return for 1993 reported $8,000 in unspecified "commissions" as his sole source of income. Claimant's 1994 and 1995 tax returns reported commissions income of $24,000 and $36,000,

respectively. These figures were identified as gross receipts on Schedule C of Claimant's Form 1040 tax returns, and were not offset by any business related expenses. No other source of income is reflected on either the 1994 or 1995 tax return. Claimant did not file any tax return after 1995.

In May 1996, Claimant's activities came under scrutiny by state and federal law enforcement officials investigating a drug smuggling/money laundering scheme stretching from Texas to Albemarle, North Carolina. The investigation revealed that from June 1995 to May 1996, Claimant and Mr. Paulette, his business partner, had transported of 700 pounds of marijuana from Texas to North Carolina, where Mr. Paulette's son, Harold, and son-in-law, Leonard Bessone, assisted in distributing the marijuana. Claimant received payment for the drugs either in cash, delivered to Laredo by John Paulette, or by wire transfers. These wire transfers were directed to Claimant, Claimant wife, and to Fiesta Tire. Claimant has admitted that the profit per pound was between $50 and $75, split between Claimant and John Paulette.

On May 15, 1997, Claimant was arrested in New York after selling approximately 200 pounds of marijuana to an undercover police officer for $135,000. Following this arrest, Claimant and his co-conspirators were indicted in the Middle District of North Carolina for conspiracy to distribute marijuana and conspiracy to launder money. In an interview with U.S. Customs Service agents while in custody, Claimant admitted that he had started dealing drugs in 1994[2] and had used

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[2]The bill of indictment filed in this district charged Claimant with conspiring to distribute drugs for in or about June 1995, and conspiring to launder money form in or about August 1995. Claimant vigorously disputes that the drug conspiracy commenced as early as 1994, as Customs agents represent. It is unclear whether Claimant denies dealing any drugs whatsoever as early as 1994, or whether Claimant merely denies being a part of the Paulette-Bessone conspiracy at that time.

drug proceeds to purchase some of the materials used to build his home at 3714 Cancun Loop.

On February 20, 1998, Claimant plead guilty to charges of conspiracy to launder money and conspiracy to distribute marijuana and was sentenced to 121 months' imprisonment. He presently is confined at F.C.I. Texarkana, Texarkana, Texas.

Claimant disputes that drug proceeds were used to finance the construction of his home and asserts that Special Agent Jack Barnwell of the U.S. Customs Service committed perjury by declaring under oath that Claimant had said so. Claimant alleges that the attorney who represented him on the New York charges, Mr Ernest Peace, initiated a meeting with federal agents working on the North Carolina investigation in an attempt to procure a downward departure in Claimant's sentencing. According to Mr. Peace, when Claimant told the agents at this meeting that the Government was trying to take away his home, they replied that they were not interested in taking Claimant's home but in prosecuting Claimant and others for their actions. These negotiations did result in a downward departure motion for Claimant, however, because the Government questioned Claimant's truthfulness as to the quantity of drugs he distributed.

II. DISCUSSION

Claimant has failed to offer competent evidence to rebut the Government's showing of probable cause that his property at 3714 Cancun Loop, Laredo, Texas was financed by illegal drug proceeds. As such, summary judgment will be granted to Plaintiff, and a judgment of forfeiture will be entered against the defendant property.

Summary judgment is appropriate when the pleadings and other evidence show that there is no genuine issue of material

fact and the moving party is entitled ro judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). "Where the record taken as a whole could not lead a rational trier of facts to find for the non-moving party, there is no genuine issue for trial." Matshushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

Section 881(a), Title 21, United States Code, provides for forfeiture to the United States of, inter alia:

> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for controlled substance or listed chemical in violation of this subchapter, **all proceeds traceable to such an exchange,** and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

21 U.S.C. 881(a)(6) (West 2002) (emphasis added). In an action brought pursuant to this section, the government "has the initial burden of demonstrating probable cause for the belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by statute." United States v. Thomas, 913 F.2d 1111, 1114 (4th Cir. 1990). To demonstrate probable cause, the government must show "Reasonable ground[s] for belief of the property's guilt; supported by less than prima facie proof but more than mere suspicion." United States v. One Parcel of Real Property, 921 F.2d 370, 373 n.6 (1st Cir. 1990). The evidence relied upon by the government in establishing probable cause need not be admissible in court, but it nevertheless must be reliable. See United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 639 (1st Cir. 1988).

Once the government has established probable cause, the burden shifts to the claimant to establish by a preponderance of the evidence that the defendant property was not purchased with drug proceeds or otherwise connected to illegal drug activity. See United States v. One Single Family Residence, 933 F.2d 976, 979 (11th Cir. 1991). If the claimant is unable to produce such evidence to rebut the government's assertion, probable cause alone will justify a judgment of forfeiture. See Thomas, 913 F.2d at 1114.

In the instant case, it is clear that the Government has produced substantial circumstantial evidence of the defendant property's connection to drug trafficking. See Thomas, 913 F. 2d at 1117 (finding circumstantial evidence sufficient to support probable cause). Claimant was convicted of drug conspiracy charges involving the distribution of more that 700 pounds of marijuana between June 1995 and May 1996 alone. Even using Claimant's own conservative estimate of $50 profit per pound of marijuana sold (with $25 profit going to Paulette and $25 to Claimant), Claimant would have earned $17,500 during that one-year period. At $75 profit per pound, Claimant would have earned over $26,000. Despite the fact that Claimant had no documented legitimate income from 1993 to 1997, he was able to make payments to Hill Top totaling $17,193 for the defendant property. Moreover, Claimant also was able to expend an unknown but undoubtedly substantial sum of money on building materials for his home, resulting in a finished residence that was assessed at $106,720 in1997. These circumstances, when considered in their totality, create probable cause to believe that Claimant's home was financed by drug proceeds. See Thomas, 913 F. 2nd at 1117 (courts are not to parse various items of evidence in isolation, but to consider evidence in its totality).

Claimant has offered little evidence to rebut the Government's showing of probable cause that his residence was

financed with drug trafficking proceeds. Even if the court were to take at face value Claimant's assertion that he earned $8,000 in 1993, $25,000 in 1994, and $36,000 in 1995 in "commissions" income[3] (on the basis of his tax returns, offered without any supporting documentation), his "legitimate" income is far exceeded by his expenditures for the period. Claimant made over $17,000 in payments toward his lot and was able to purchase building materials and/or hire subcontractors to build a residence that was valued by tax authorities in 1997 at over $100,000. Morever, Claimant somehow found enough cash for his business, Fiesta Tire, to make disbursements resulting in a net loss to the business of over $48,000.

Under the "net worth" theory, the court is allowed to presume that a claimant's expenditures in excess of legitimate sources of income are from illegitimate sources of income, in the absence of any explanation reasonably susceptible of being checked. See United States v. Nelson, 851 F.2d 976, 980 (7th Cir. 1988). Because Claimant has failed to provide any such explanation, this court finds that Claimant has failed to establish by a preponderance of the evidence that the defendant property was not purchased with drug proceeds.

III. CONCLUSION

Claimant has failed to rebut the Government's showing of probable cause that the defendant property was financed with drug proceeds, and, consequently, has failed to raise a genuine issue of material fact. Therefore, pursuant to 21 U.S.C. 881(a)(6), the Government's motion for summary judgment will be granted and the defendant property will be forfeited to the United States.

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[3] The court notes that these income figures are suspiciously round for one who claims to have self-employed in the field of auto body repair.

A judgment in accordance with this memorandum opinion will be filed contemporaneously herewith.

This the 17th day of May, 2002.

" s/ William L. Osteen "

United States District Judge

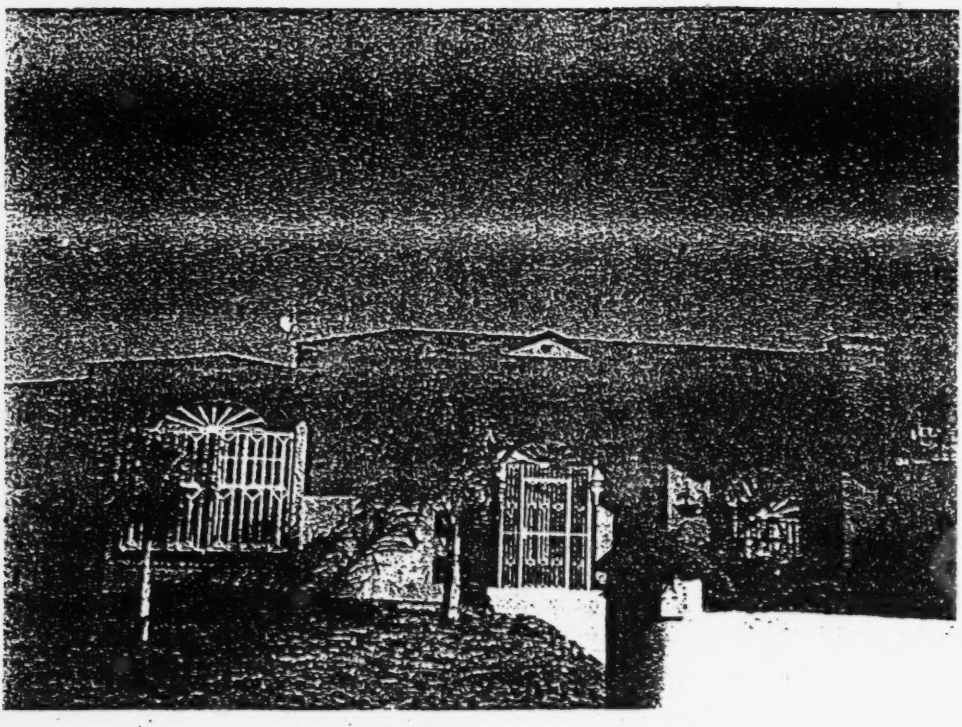


EXHIBIT A

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff,

V. 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,
Defendant

GOVERNMENT'S TRAVERSE TO CLAIMANT'S REPLY

NOW COMES the plaintiff United States of America, by and through Anna Mills Wagoner, United States Attorney for the Middle District of North Carolina, and respectfully moves the Court to consider this brief traverse to Claimant Jose Antonio Lozano's "Reply to Government's Response to Defendant's Motion for Summary Judgment," dated 2/27/02.

In his reply, Claimant Lozano argues that the government's Response to his Motion for Summary Judgment was untimely and should therefore be disregarded by the Court. No further pleading is contemplated under the Local Rules. Lozano's argument, however, goes beyond the scope of a reply brief as defined in LR 7.3(h) and would more appropriately be set forth in a motion to the Court. Because the argument is not the subject of a separate motion, the government respectfully asks the Court to consider this brief response. As set forth below, Lozano's math and/or his application of the applicable rules is faulty.

Lozano served his Motion for Summary Judgment (Dkt. at

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1:98-CV-00011

UNITED STATES OF AMERICA,
Plaintiff

REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES, Defendant Jose A. Lozano, ("Lozano") appearing pro-se and respectfully submits this reply in support of his summary judgment motion, filed January 18, 2002. On February 19, 2002, the government filed a response to Lozanos summary judgment. Certainly, the government's response is untimely in accordance with the authority of Local Rules (L) 56.1(d), 7.3(F) and 7.3(K). Specifically, LR 7.3(K), emphasized in pertinent part that:

> "The failure to file a brief of response within the time specified in this rule shall constitute a waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect, ... if a respondent fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice. (Emphasis Added)

Perspicuously, LR 7.3(F), specifies that the respondent, if opposing a motion, shall file a response, including brief,

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff,

V. 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,
Defendant

GOVERNMENT'S RESPONSE TO CLAIMANT JOSE A. LOZANO'S MOTION FOR SUMMARY JUDGMENT

NOW COMES plaintiff, United States of America, by and through Anna Mills Wagoner, United States Attorney for the Middle District of North Carolina, and responds to Claimant Jose A. Lozano's Motion for Summary Judgment.

I. FACTS

The Government incorporates herein the facts of this case as set forth in its Memorandum in Support of Government's Motion for Summary Judgment filed August 31, 2001, including all exhibits thereto.

II. ARGUMENT

A. The Complaint Satisfies the Requirements of Rule E(2)(A) of the Supplemental Rules of Certain Admiralty and Maritime Claims.

A complaint for forfeiture must meet the pleading

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1:98-CV-00011

UNITED STATES OF AMERICA,
Plaintiff

MOTION FOR SUMMARY JUDGMENT

NOW COMES, Jose A. Lozano, ("Lozano") appearing pro-se, and respectfully moves this Honorable Court for Summary Judgment pursuant to Fed. R. Civ. P. 56. Lozano moves for an order granting Final Summary Judgment against Plaintiff. (The "Government").

Summary Judgment is proper in this case because there is no genuine issue of any material fact and because Lozano is entitled to judgment as a matter of law. Specifically the Government's complaint did not sufficiently allege connection between Lozano's home and the criminal activity. The Government bears the burden of pleading a connection between Lozano's home and the predicate acts at the complaint stage. Likewise, it must plead sufficient facts to support a reasonable belief that the Government can demonstrate probable cause for finding connection between Lozano's home and the underlying offense. Government's burden of going forward at trial is reflected in the standard for a sufficient forfeiture complaint.

More pointedly, the complaint does not satisfy the particularity requirements under supplemental admiralty and m

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1:98-CV-00011

UNITED STATES OF AMERICA,
Plaintiff

DEFENDANT'S MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

NOW COMES, Jose A. Lozano, (Lozano), appearing Pro-Se, and respectfully submits, the following memorandum including Lozano's exhibits (Hereinafter "L E") A through G (A -G) in support of his motion for Summary Judgment on the Plaintiff's (The "Government") Forfeiture Action in REM under Title 21 USC 881. Summary Judgment should be granted in this case because there is no genuine issue of fact on any element of the Government's Forfeiture Action.

STATEMENT OF CASE

On 1/6/98, the Government filed a complaint for forfeiture against Lozano's home, alleging violation of Title 21 USC 881 The Complaint did not sufficiently allege connection between Lozano's home and the criminal activity. (LE A Pg. 9-11) Government's complaint only relies form a declaration of U.S. Customs Agent, Jack H. Barnwell ("Mr, Barnwell") (LE A Pg. 13-15) that in fact is deficient. On 1/22/98, the US Magistrate Judge, P. Trevor Sharp (the "Magistrate") issued a warrant for arrest Lozano's home, and a notice in REM. The Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY	§	
LAREDO, TEXAS (JOSE A. LOZANO)	§	
Defendant,	§	
	§	
v.	§	Case No. 1:98CV00011
	§	
UNITED STATES OF AMERICA		
PLAINTIFF.		

LOZANO'S EXHIBITS "A THROUGH G"

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1:98-CV-00011

UNITED STATES OF AMERICA,
Plaintiff

NOTICE OF INTENT TO FILE DISPOSITIVE MOTION

Now comes, Jose Antonio Lozano, appearing Pro-Se, pursuant to Local Rule 56.1(a), and gives notice to this honorable Court of intent to file a dispositive motion in the above-name case.

Executed this the 21 day of December, 2001.

Respectfully submitted,

Jose Antonio Lozano
Reg.No. 19074-057 (E unit)
F.C.I. Texarkana
P.O. Box 7000
Texarkana, Texas 75505-7000

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1:98-CV-00011

UNITED STATES OF AMERICA,
Plaintiff

MOTION TO ENLARGE TIME TO
FILE AMENDMENT MOTION

Now comes, Jose A. Lozano, ("Lozano") appearing Pro-Se, and respectfully moves this Honorable Court to enlarge the time to file any amendment motion. Lozano respectfully states that he is awaiting for the completion of discovery. On 1/25/02, the Court issued an order allowing parties to filed any amendment motion necessitated by the delivery of discovery on or 2/28/02. On 1/25/02, the Government responded Lozano's discovery incomplete. On 2/12/02, Lozano filed a motion to compel the government to make disclosures. Lozano is awaiting for the Government's response to his motion to compel.

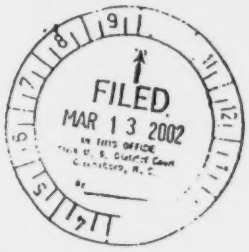
Wherefore, Lozano respectfully requests the Court enlarge the time to file any amendment motion to and including 3/28/02 to allow for completion of discovery request, or the Government's response to Lozano's motion to compel.

Executed this the 27th day of February, 2002.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff



v.

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS, WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON
Defendant 1: 98 CV 00011

JOSE A. LOZANO,
Claimant

ORDER

This matter is before the court on Claimant Jose A. Lozano's Motion to Compel Plaintiff to Make Disclosures Required by Rules 26, 33, and 34 (Doc. No. 80) and Claimant's Motion to Enlarge Time to File Amendment Motion {Doc. No. 80}. The matter is currently set for trial on Monday June 3, 2002.

Having fully considered Claimant's Motion to Compel and finding insufficient cause to grant such request.

IT IS THEREFORE ORDERED that Claimant Motion to Compel{80} is denied.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1 : 98 CV 00011

UNITED STATES OF AMERICA
Plaintiff

REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO COMPEL

Now comes, defendant Jose A. Lozano, ("Lozano") appearing pro-se and respectfully submits this reply in support of his Motion to Compel the Government to make disclosures required by Rule 26, 33, and 34 of the Fed. R. of Civ. P. On 3/4/02, the Government filed a response to Lozano's motion to compel wherein it further refuse to comply with its discovery obligations. In its response the Government is preserving in its reservation of rights language, supporting such rights on Fed. R. Civ. P. 26(e). (Govt's Re. At 2) Certainly the plain language of Rule 26(e), reserves no rights to any party, rather, it provides a "duty" to supplement or correct the disclosure or response to include information "thereafter" acquired.

In his interrogatories and produce of documents Lozano is requesting all documents "already" within the Government's custody and control related to this action. Inasmuch as, the Government made a number of assertions in support of its Summary Judgment, the Government needs to disclose any and all documents or report concerning (1) the allegedly information provided

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff

v.

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS, WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON
Defendant 1: 98 CV 00011

GOVERNMENT'S RESPONSE TO MOTION TO COMPEL

NOW COME the plaintiff United States of America, by and through Anna Mills Wagoner, United States Attorney for the Middle District of North Carolina, and respectfully submits this Response to Jose A. Lozano's Motion to Compel dated 2/7/02. In this motion, Claimant Lozano argues that the Government's responses to Interrogatories and Requests for Production of Documents are incomplete. The government herein responds to Lozano's objections.

Generally

As set forth in the government's response to discovery, which is appended to claimant Lozano's Motion to Compel, the government made its best effort to respond thoroughly to the discovery requests. (Govt's Response to Discovery, I.1) Plaintiff also reserved the right to supplement or modify its response based on the discovery of additional or different information. (Id.) This "right" is in actuality a duty imposed by Fed. R. Civ. P. 26(e). In "reserving" this right, plaintiff

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IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. **Civil No. 1:98-CV-00011**

UNITED STATES OF AMERICA,
Plaintiff

MOTION TO COMPEL PLAINTIFF TO MAKE DISCLOSURES REQUIRED BY RULE 26, 33, AND 34

NOW COMES, Jose A. Lozano ("Lozano") appearing Pro-se and respectfully moves this Honorable Court pursuant to Fed. R. Civ. P. to respond discovery request pursuant to Rules 26(F) 33 and 34 of the Fed. R. Civ. P. Lozano asks the court to enforce Rules 26(F) 33 and 34, ordering the Government respond to the outstanding discovery request on or before February 18, 2002.

Under Rule 37 the Government's failure to serve on Lozano a complete and timely response to the request in accordance with the above-mentioned Rules, may result in certain sanctions, including dismissal of the Government's Complaint. A Memorandum of Law in Support of this motion is attached hereto.

Executed this the 7th day of February, 2002.

Respectfully submitted,

Jose A. Lozano

Jose Antonio Lozano
Reg.No. 19074-057 (E unit)
F.C.I. Texarkana
P.O. Box 7000
Texarkana, Texas 75505-7000

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff

v.

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS, WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON
Defendant 1: 98 CV 00011

JOSE A. LOZANO,
Claimant

ORDER

This matter is before the court on Claimant Jose A. Lozano's Motion to Compel Plaintiff to Make Disclosures Required by Rules 26, 33, and 34 [Doc. No. 80] and Claimant's Motion to Enlarge Time to File Amendment Motion [Doc. No. 84]. The matter is currently set for trial on Monday, June 3, 2002.

Having fully considered Claimant's Motion to Compel and finding insufficient cause to grant such request.

IT IS THEREFORE ORDERED that Claimant's Motion to Compel [80] is denied.

Furthermore, having considered the time expended by the parties in connection with the aforementioned discovery dispute,

IT IS FURTHER ORDERED that Claimant's Motion to Enlarge Time to File Amendment Motion[84] is granted. Claimant will have until and including March 28, 2002, to file any necessary amendments in preparation for trial.

This the 13th day of March, 2002

" s/ William L. Osteen "
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff

v.

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS, WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON
Defendant 1: 98 CV 00011

GOVERNMENT'S RESPONSE TO MOTION FOR DISCOVERY SANCTIONS

NOW COMES the plaintiff United States of America, by and through Anna Mills Wagoner, United States Attorney for the Middle District of North Carolina, and respectfully submits this Response to Jose A. Lozano's Motion for Discovery Sanctions.

On 9/19/01, the Court issued an order, (Dkt.67) extending the discovery deadline to December 20, 2001. On 11/14/01, Lozano filed "Defendant's Request for Production to Plaintiff On 12/21/01, counsel for the United States informed Mr. Lozano by letter that responses to his discovery were being formulated and responses would be forthcoming in January. On 12/28/01, claimant Lozano filed his motion for discovery sanctions.

Local Rule 26.1(c) provides that:
(t)he court will not consider motions and objections relating to discovery unless moving counsel files a certificate that after personal consultation and diligent attempts to resolve differences the parties

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1:98 CV 00011

UNITED STATES OF AMERICA
Plaintiff

MOTION FOR DISCOVERY SANCTIONS

Now comes, defendant Jose A. Lozano, ("Lozano") appearing Pro-Se, and respectfully moves this Honorable Court, pursuant to Fed. R. Civ. P. 37(b) to sanction Plaintiff (The "Government") for failure to comply with Lozano's Discovery requests made pursuant to Rules 33,34, and 26(f) of the Federal Rules of Civil Procedures. A memorandum of law in support of this motion including exhibits is attached hereto.

Executed this the 28 day of December, 2001

Respectfully submitted,

Jose A. Lozano

Jose Antonio Lozano
Reg.No. 19074-057 (E unit)
F.C.I. Texarkana
P.O. Box 7000
Texarkana, Texas 75505-7000

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1:98 CV 00011

UNITED STATES OF AMERICA
Plaintiff

MEMORANDUM IN SUPPORT OF MOTION
FOR DISCOVERY SANCTION

A. Introduction

This is a Civil Forfeiture Action in Rem. Plaintiff (The "Government") filed a Verified Complaint against Jose A. Lozano's ("Lozano") residence, alleging that either Lozano's residence was used or was intended to be uses to facilitate drug offenses or was purchased with drug proceeds in violation of Title 21 U.S.C. 881.

Lozano asks the Court to sanction the Government because it failed to make timely a disclosure required by Rule 26(f) and pursuant to Rules 33, and 34 Fed. R. Civ. P. On 11/14/01, Lozano filed a set of interrogatories and a set of produce of document to the Government, such documents specifically advised the Government that it must answer the interrogatories and produce of documents within 30 days after service. (See exhibit A). On 12/21/01, seven (7) days after the time to respond expired, the Government notice Lozano that they are in the process of formulating their discovery responses, (See exhibit B). It is unclear from the record whether the

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v. Civil No. 1:98 CV 00011

UNITED STATES OF AMERICA
Plaintiff

CERTIFICATION

I, Jose A. Lozano, state pursuant to 28 U.S.C. 1746, under penalty of perjury to the best of my knowledge, that the following is true and correct.

1) I am the Defendant in the above-captioned matter and make this certification to certify the following information:

2) On 12/29/00, the court of Appeals vacated and remanded Lozano's case for expansion of the record. Therefore, on 3/29/01, the District Court issued an order for Reopen Discovery up to 6/29/01, the Government withheld such order for almost three months.

3) Eventually on 6/26/01, Lozano received the Court's order dated 12/29/00. On 6/28/01 Lozano filed a motion to modify such order. On 7/10/01, the Government responded the motion to modify and did not opposed to the modification.

4) Although, the Government did not opposed to the modification of the aforesaid order, on 8/30/01, and still within the period of Discovery proceedings, the Government filed a Summary Judgment. Therefore, on

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff,

V. 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,
Defendant

JOSE A. LOZANO,
Claimant

ORDER

This matter has been on the Master Calendar for trial during the January 2002 Term. The case was specifically set for February 4, 2002.

A review of the file indicates that the Government has not responded to outstanding discovery. It appears that the discovery was not deem by the Government to be beyond the limits of appropriate discovery but that for some reason it has taken a lengthy time to respond. It may be that the discovery request is material to the summary judgment motions or to the trial on the merits.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
Plaintiff,

V. 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS, WITH ALL APPUR-
TENANCES AND IMPROVEMENTS
THEREON,
Defendant

GOVERNMENT'S REPLY

NOW COMES the plaintiff United States of America, by and through Benjamin H. White, Jr., United States Attorney for the Middle District of North Carolina, and respectfully submits this Reply in support of its Summary Judgment Motion, filed 8/30/01/. On 8/13/01, Jose A. Lozano filed a Response To Government's Summary Judgment. In his Response, Lozano initially argued that the government's summary judgment was premature because 1) the court had not decided Lozano's motion to apply CAFRA to this case; 2) Lozano did not receive the court's order dated 3/29/01 for almost three months; and 3) the court had not decided Lozano's motion requesting a transcript of the status conference on 3/29/01. On 9/19/01, the Court issued an order (Dkt.67) granting Lozano's motion to extend discovery in this proceeding until 12/20/01, denying Lozano's motion for a transcript of the status conference on 3/29/01 and denying Lozano's motion to apply the Civil Asset Forfeiture Reform Act of 2000, (CAFRA), to this proceeding.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS (JOSE A LOZANO)
DEFENDANT

V

Case No.1:98CV00011

UNITED STATES OF AMERICA
RESPONDENT

RESPONSE TO GOVERNMENT'S SUMMARY JUDGMENT

NOW COMES, Jose Antonio Lozano, (Lozano) appearing Pro-Se and respectfully submits his request to Government's motion for Summary Judgment pursuant to F.R.C.P. 56 in support of Lozano's response, Lozano hereby submits the following including Lozano exhibits (hereinafter "Le" A-G). Further, Lozano hereby asserts that Government's motion for Summary Judgment should not be granted for the following reasons:

THE GOVERNMENT LACKS SUBJECT MATTER JURISDICTION TO FORFEIT LOZANO'S RESIDENCE WHICH DID NOT VIOLATE ANY FEDERAL STATUTE

Lozano hereby states that the Government lacks Subject Matter Jurisdiction upon Lozano home that certainly, did not violate any Federal Statute. Although this is a civil action pursuant to 21 USC 881 and 18 USC 981, seeking forfeiture of Lozano's residence, Lozano unequivocally asserts that his residence did not violate such statutes. The Government speculates that Lozano's residence was used or intended to be used to commit or facilitate drug transactions of which allegedly represents the proceeds of or property traceable to such property used in violation of USC 1956 and/or 1957.

The Government's speculations lack support, first and foremost, because since this action began the Government has

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON
DEFENDANT

MOTION FOR SUMMARY JUDGMENT

NOW COMES the United States of America, by and through Benjamin H. White Jr., United States Attorney for the Middle District of North Carolina, and moves for summary judgment pursuant to Fed. R. Civ. P. 56. In support of this motion, the government relies upon its Memorandum in Support submitted herewith, including Government Exhibits (GE) A through L.

WHEREFORE the United States moves that summary judgment be granted in its favor.This the 30th of August, 2001.

Respectfully submitted,

BENJAMIN H. WHITE, JR
United States Attorney

"s/ Lynne P. Klauer"

Lynne P. Klauer
Assistant United States Attorney
NCSB # 13815
P.O. Box 1858
Greensboro, NC 27402
910-333-5351

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO
1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON
DEFENDANTS

MEMORANDUM IN SUPPORT OF GOVERNMENT'S
MOTION FOR SUMMARY JUDGMENT

NOW COMES the plaintiff United States of America, by and through Benjamin H. White Jr., United States Attorney for the Middle District of North Carolina, and respectfully submits the following memorandum and Government Exhibits (hereinafter "GE") A-L in support of its Motion for Summary Judgment.

STATEMENT OF THE CASE

This is a forfeiture action filed pursuant to 21 USC § 881 seeking forfeiture of the real property located at 3714 Cancun Loop, Webb County, Laredo, Texas with all appurtenances and improvements thereon, which was used or intended to be used to commit or facilitate violations of 21 USC §§ 801 et seq or which constitutes proceeds traceable to exchanges of controlled substances in violation of 21 USC § 801 et seq.

This action was also brought to enforce the provisions of 18 USC § 981 for the forfeiture of the defendant property which was involved in transactions or attempted transactions in violation of

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY	§	
LAREDO, TEXAS (JOSE A. LOZANO)	§	
Defendant,	§	
	§	
v.	§	Case No. 1:98CV00011
	§	
UNITED STATES OF AMERICA		
PLAINTIFF.		

GOVERNMENT'S EXHIBITS "A THROUGH L"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY	§	
LAREDO, TEXAS (JOSE A. LOZANO)	§	
Defendant,	§	
	§	
v.	§	Case No. 1:98CV00011
	§	
UNITED STATES OF AMERICA		
PLAINTIFF.		

GOVERNMENT'S NOTICE TO FILE DISPOSITIVE MOTION

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS (JOSE A. LOZANO)
DEFENDANT

V

CIVIL NO
1:98CV00011

UNITED STATES OF AMERICA
PLAINTIFF

NOTICE OF APPEAL

Notice is hereby given that, Jose Antonio Lozano, Defendant in the above name case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order entered the 19th day of September 2001, denying motion to adopt the New Civil Asset Forfeiture Reform Act of 2000.

Executed this 1st day of October 2001.

Respectfully submitted

Jose A. Lozano

Jose Antonio Lozano
Reg. No. 19074-057 # E
F.C.I. Texarkana
P.O. Box 7000
Texarkana, Texas75505

CERTIFICATE OF SERVICE

I, Jose Antonio Lozano hereby certify that a true and correct copy of the foregoing document has been deposited in the prison mail box to be mailed to, Lynne P. Klauer, U.S. Assistant Attorney, at PO Box 1858 Greensboro, N.C. 27402 by certified mail on this 1st day of October 2001.

Jose A. Lozano

Jose Antonio Lozano

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MAY 13,2002

MANDATE

TO: Clerk, District Court/Agency

FROM: Deborah A. Davenport
Deputy Clerk

RE: 01-2269 US v Lozano
CA- 98-11-1

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 3/21/02.

( ) Order and Certified Copy of Judgment

(X) Opinion and Certified Copy of Judgment

( ) Order on Costs

( ) Order dismissing appeal R 42(b) or Local Rule 45

( ) Other:_____

( ) The record has been retained for use in case #____
A copy of the judgment is enclosed to counsel/pro-se parties

cc: Lynne P. Klauser
Jose Antonio Lozano

JUDGMENT

FILED: March 21, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 01-2269
CA-98-11-1

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

V

JOSE ANTONIO LOZANO
CLAIMANT-APPELLANT

AND

PROPERTY 1714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON
DEFENDANT

V

HILL TOP FARM, LIMITED,
A TEXAS LIMITED PARTNERSHIP
CLAIMANT

Appeal from the United States District Court for the Middle District of North Carolina at Durham

In accordance with the written opinion of this Court filed this day, the Court dismisses the appeal.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO 01-2269

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

V

JOSE ANTONIO LOZANO
CLAIMANT-APPELLANT

AND

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON
DEFENDANT

V

HILL TOP FARM, LIMITED, A TEXAS
LIMITED PARTNERSHIP
CLAIMANT

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, District Judge. (CA-98-11-1)

Submitted: March 14, 2002 Decided: March 21,2002

PER CURIAM

Jose Antonio Lozano appeals the District Court's order denying his motion for a transcript and for application of a specific statute. We dismiss the appeal for lack of jurisdiction, because the order is not appealable. The court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (1994), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (1994); Fed. R. Civ. P. 54 (b): Cohen v Beneficial Indus Loan Corp 337 U. S. 541 (1949). The order here applied is neither a final order nor an appealable interlocutory or collateral order.

We dismiss the appeal as interlocutory. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

INFORMAL BRIEF 01-2269

1. Jurisdiction

A. Name of the court from which you are appealing?

U. S. District Court Middle District of North Carolina

B. What is the date of the Order you are appealing?

September 19, 2001

2. Timeliness of appeal

When did you give your notice of appeal to a prison officer for mailing to the United States District Court?

October 1, 2001

3. Issues on Appeal

Use the following space to tell the United States Court of Appeals from the Fourth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded. Appellant must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. .

Issue 1

The District Court erred in denying the Application of the provisions of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). The Government should not proceed with the pre-2000

(Continue See attachment)

Supporting Facts and Argument

Congress has recently approved new legislation that creates new general rules relating to Civil Forfeiture Proceedings. The Civil Asset Forfeiture Reform Act(CAFRA) of 2000, H.R. 1658, 106th Cong, 2(2) enhances the Government's burden of proof in

(Continue see attachment)

Issue 2

Defendant is entitled to transcripts of any hearing or conference regarding this forfeiture action as a matter of Due Process of Law

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON
DEFENDANT

ORDER

On September 19, 2001, this court entered an order setting a trial date of February 2002. Among other things, that same order determined that the Civil Asset Forfeiture Reform Act of 2000 is inappropriate to this proceeding.

From the ruling on inapplicability of the Civil Asset Forfeiture Reform Act of 2000, the Claimant, Jose Antonio Lozano, gave notice of appeal to the Fourth Circuit. This court, without intruding on the authority of the Court of Appeals for the Fourth Circuit, believes the notice of appeal is untimely. Thus, under Rule 11 (e), Federal Rules of Appellate Procedure, this court finds that the record should be retained for trial by this court while the appeal is pending.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

v Case No.98CV00011

UNITED STATES OF AMERICA
Plaintiff

MOTION TO ADOPT NEW AND APPLICABLE CIVIL ASSET FORFEITURE REFORM ACT, AND TO PROCEED ACCORDING TO ITS GENERAL RULES FOR CIVIL FORFEITURE PROCEEDINGS

Now comes, Jose Antonio Lozano, (Lozano) appearing Pro-se and respectfully moves this honorable court to adopt new and applicable Civil Asset Forfeiture Reform Act, H.R. 1658, and to proceed according to its general rules for Civil Forfeiture Proceedings, inter alia pursuant to 18 U.S.C. 983 (b)(2)(A), 983(c), rules 26(a)(1)(E), 26(F) and 16(b). In support of this motion, Lozano respectfully states the following:

STANDARD OF REVIEW

On April 25,2000, Congress passed remedial legislation in accordance with the provisions of Section 2072-75 of Title 28, United States Code. The Amendment consist in several changes of criminal and civil forfeiture proceedings, under new Civil Asset Forfeiture Reform Act, H.R. 1658, the amended rules took affect December 1, 2000, and shall govern in all proceedings in criminal or civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

The new legislation, Interalia, changes and raises the government's burden of proof by requiring the government to

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CASE NO 1:98CV-00011

PROPERTY, 3714 CANCUN LOOP, WEBB COUNTY, LAREDO, TEXAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON
DEFENDANT

ORDER

On March 29, 2001, this court entered an order setting aside the original judgement of forfeiture which had been entered on March 15, 2000. In the order of March 15, 2000, discovery was reopened for a period of 90 days, closing on June 29, 2001. A schedule for dispositive motions was set culminating in a trial on November 19, 2001.

The record reflects that the order reopening discovery was sent to the Claimant, Jose A. Lozano, but was returned in June 2001, with the notation of a wrong address. A new mailing, including the court's March 29 order, was completed on June 18, 2001. The Claimant Lozano contends and the court accepts as true that he received the order on June 25, only four days before close of discovery. Claimant has moved to extend the time of discovery and such motion is justified. The Government does not object.

On July 16, 2001, the Claimant filed a request for a transcript of the status conference held on March 29, 2001. The only purpose of that conference, which was not attended by the Claimant or his lawyer, was to reopen discovery and set a trial schedule. Since the court is now reopening discovery again, a copy of the March 29 transcript would serve no

beneficial purpose for the Claimant and should be denied.

The Claimant has filed a motion to adopt the new Civil Asset Forfeiture Reform Act of 2000 for purpose of disposing of this matter. The Act was enacted on April 25, 2000, and became operable 120 days thereafter or August 23, 2000. The new Act and the amendments therein are applicable only to forfeiture proceedings commenced after August 23, 2000. See United States v Ahmad 213 F. 3d 805, 808 n.1 (4th Cir. 2000). The present proceeding was instituted on January 6, 1998, and is subject only to the pre-2000 amendment to the Forfeiture Act. Thus, Claimant's motion should be denied.

IT IS THEREFORE ORDERED that Claimant's motion (57) is granted and discovery in this proceeding is extended to December 20, 2001. Summary Judgment motions, if any, shall be filed within 30 days thereafter and trial shall be set on or after February 1, 2002.

IT IS FURTHER ORDERED that Claimant's motion for a transcript of the status conference on March 29,2001 (58) should be and is hereby denied.

IT IS FURTHER ORDERED that the Claimant's motion to apply the Civil Asset Forfeiture Reform Act of 2000 (59) to this proceeding which began before August 23, 2000, should be and is hereby denied.

IT IS FURTHER ORDERED that the trial of this matter, presently set for November 19, 2001 should be and is hereby continued until on or after February 1, 2002.

This the 19th day of September 2001.

"s/ William L Osteen"

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS (JOSE A. LOZANO)
Defendant

V

Case No. 1:98CV00011

UNITED STATES OF AMERICA
Plaintiff

MEMORANDUM IN SUPPORT OF DEFENDANT'S REPLY TO GOVERNMENT'S OPPOSITION TO THE APPLICATION OF THE PROVISIONS OF THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000

Defendant Jose Antonio Lozano, (Lozano) hereby respectfully request this court not to adopt Government's opposition to the application of the provisions of the Civil Asset Forfeiture Reform Act of 2000. H.R. 1658 (Hereinafter "the act")

LANDGRAF DOCTRINE

The court should not adopt Government's opposition to the act, because it conflicts with a long well settled precedent of the Supreme Court, established in Bradley v School Bd of City of Richmond 416 U.S. 696,714 94 S.Ct 2006, 40 L. Ed 2d 476 (1974), and Landgraf v USI Film products 511 U.S. 244,273 114 S.Ct 1483 128 L. Ed 2d 229 (1994). The Supreme Court has stated that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect (even absent specific legislative authorization, application of statutes passed after the events in the suit is unquestionable proper") Because the statute does not explicitly state whether it applies to pending cases, the case law on the subject controls.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS (JOSE A LOZANO)
DEFENDANT

V CASE NO 1:98CV00011

UNITED STATES OF AMERICA
PLAINTIFF

DEFENDANT'S REPLY TO GOVERNMENT'S OPPOSITION TO THE APPLICATION OF THE PROVISIONS OF THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000

NOW COMES, Jose Antonio Lozano (Lozano) appearing Pro-Se and respectfully moves this Honorable Court replying the Government's opposition to the application of the provisions of the Civil Asset Forfeiture Reform Act of 2000. H.R. 1658. A Memorandum of Law in support of this reply is attached hereto,
Executed this 7th day of September, 2001.

Respectfully submitted,

Jose A. Lozano

Jose Antonio Lozano
Reg. No. 19074-057(E- Unit)
F.C.I. Texarkana
P.O. Box 7000
Texarkana, Texas 75505-7000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON

DEFENDANTS

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO THE APPLICATION OF THE PROVISIONS OF THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000 (CAFRA) TO PROCEEDINGS COMMENCED BEFORE AUGUST 23,2000

Now COMES the plaintiff United States of America, by and through Benjamin H. White, Jr., United States Attorney for the Middle District of North carolina, and respectfully, files this memorandum in opposition to the Motion to Adopt New and Applicable Civil Asset Forfeiture Reform Act filed by claimant Jose Antonio Lozano.

1. CAFRA DOES NOT APPLY TO CASES COMMENCED BEFORE AUGUST 23,2000

A. Section 21 of CAFRA

Claimant Lozano suggests that the provisions of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub L.106-185, 114 Stat. 202 (2000), and in particular, the provisions of 18 USCg83 relating to burden of proof and the right to counsel, should apply to this case.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS THEREON
DEFENDANTS

ORDER

After reviewing the opinion of the Fourth Circuit Court of Appeals, it appears that the judgment heretofore entered on March 15,2000, should be vacated and set aside and that discovery should be reopened.

IT IS THEREFORE ORDERED that the March 15, 2000 judgment of this court is vacated and set aside.

IT IS FURTHER ORDERED that discovery is reopened and the parties shall have up to and including June 29,2001, within to complete discovery. Thereafter, the parties shall have thirty (30) days within which to file and summary judgment motions. Trial shall be set for November 19, 2001.

This the 29th day of march 2001

s/ William O. Lee
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS THEREON
DEFENDANT

RESPONSE TO CLAIMANT'S MOTION TO MODIFY ORDER

COMES NOW Plaintiff United States of America, by and through Benjamin H. White Jr., United States Attorney for the Middle District of North Carolina, responding to claimant Jose Antonio Lozano's Motion to Modify order, and says as follows:

Plaintiff does not oppose claimant's Motion which is in essence a motion for extension of time for the discovery period, provided that the scheduled trial date is revised to allow adequate time for briefing and consideration of dispositive motions at the conclusion of the discovery period.

This the 10th day of July, 2001.

Respectfully submitted,
BENJAMIN H. WHITE, JR.
UNITED STATES ATTORNEY

"s/ Lynne P. Klauer"

Lynne Klauer
Assistant United States Attorney
NCSB # 13815
Post Office Box 1858
Greensboro,NorthCarolina27402
336-333-5351

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY LAREDO, TEXAS (JOSE A. LOZANO) Defendant,	§ § § §	
v.	§	Case No. 1:98CV00011
UNITED STATES OF AMERICA PLAINTIFF.	§	

MOTION TO MODIFY ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY LAREDO, TEXAS (JOSE A. LOZANO) Defendant,	§ § § §	
v.	§	Case No. 1:98CV00011
UNITED STATES OF AMERICA PLAINTIFF.	§	

MOTION TO REQUEST FOR TRANSCRIPT
OF STATUS CONFERENCE

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA

V CASE NO: 1:98CV00011

3714 CANCUN LOOP

NOTICE

Take notice that a proceeding in this case has been set as indicated below:

PLACE:	U.S. Courthouse 324 W. Market St Greensboro N.C.
COURTROOM NO.	1
DATE AND TIME	March 29,2001-11:00 A.M.
PROCEEDING	Status Conference

The claimants are not required to appear for Status Conference

J.P. Creekmore, Clerk

BY _____ Deputy Clerk

Date: March 26, 2001

TO: ALL COUNSEL AND/OR PARTIES OF RECORD

APPENDIX K

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

V

PROPERTY, 3714 CANCUN LOOP,
WEBB COUNTY, LAREDO, TEXAS
WITH ALL APPURTENANCES AND
IMPROVEMENTS THEREON
DEFENDANT NO.00-1710

V

JOSE ANTONIO LOZANO
CLAIMANT-APPELLANT

AND

HILL TOP FARM, LIMITED
CLAIMANT

Appeal from the United States District Court for the Middle District of North Carolina, at Durham, William C. Osteen, District judge
(CA-98-11-1)
Submitted: October 24, 2000
Decided: December 29, 2000

Before WILLIAMS and TRAXLER, Circuit Judges and HAMILTON, Senior Circuit Judge

Vacated and remanded by unpublished per curiam opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON

DEFENDANT

V

CIVIL NO1:98CV00011

UNITED STATES OF AMERICA
PLAINTIFF

NOTICE OF APPEAL

Notice is hereby given that Jose Antonio Lozano, defendant in the above name case hereby appeal to the UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT from the FINAL DECREE AND JUDGEMENT OF FORFEITURE entered in this action the 15th day of March 2000.

STATEMENT OF DELAYNESS
FOR NOTICE OF APPEAL FILING

On or about March 15, 2000, the District of North carolina denied the Defendant's pleading(see attachment I)

On or about March 13, 2000, the defendant was transferred by the Federal Bureau of prisons and its agents from Federal Correctional Complex, Beaumont-Medium, Beaumont, Texas to Federal Transfer Center (FTC) for redesignation mission;

On or about April 13, 2000, the defendant was transfer from FTC to FCI Texarkana, Texas.

NOTICE TO APPELLANTS

You may be sanctioned if the Court of Appeals finds your appeal is frivolous. Sanctions may include monetary penalties and a ban on filing cases in the future. If you want to avoid a finding that your appeal is frivolous, you may file a MOTION TO DISMISS APPEAL at any time before the Court decides your appeal. A form MOTION TO DISMISS APPEAL is included as the final page of this document. If your motion is granted, you may not later reinstate your appeal.

1. Jurisdiction
   A. Name of the court from which you are appealing
   B. Date of the order you are appealing

2. Timeliness of appeal

3. Issues on Appeal

Issue 1

WHETHER THE COURT ERRED IN DENYING THE DEFENDANT'S VIOLATION OF DUE PROCESS OF LAW; GOVERNMENT FAILED TO FULFILL PLEA NEGOTIATIONS

Supporting Facts and Argument

Appellant was charged with conspiracy to distribute marijuana and money laundering in Federal Court in North Carolina and in a State Court in New York. Appellant, was assigned a Court Appointed Counsel in his North Carolina case and retained personal counsel in new York.

Filed June 6, 2000

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

00-1710 US V JOSE A. LOZANO
CA-98-11-1
ORDER TO PROCEED ON INFORMAL BRIEFS

This appeal was docketed on 6/5/00. The six-digit docket number appearing above shall be placed prominently on every paper filed by any party to this appeal, as well as on all correspondence addressed to the Court.

Pursuant to Local Rule 34(b), this case shall be submitted on informal briefs. The informal briefing form is attached. Informal briefs shall be mailed to the Court, with copies to all parties, no later than the following dates:

Appellant's Brief	6/30/00
Appellee's Brief	14 days after service of appellant's brief

If appellant fails to file a brief or fails to certify that copies of the brief were mailed to all other parties, the appeal will be subject to dismissal for failure to prosecute, pursuant to Local Rule 45. Appellee may, but is not required to, respond to appellant's informal brief.

The Court will not consider issues which are not specifically raised in appellant's informal brief. If a transcript is necessary for consideration of an issue, appellant must order the transcript. Appellants who qualify to proceed without prepayment of fees and costs may apply for preparation of the transcript at government expense.

The Court obtains the record from the district court in informally briefed cases. Therefore, no appendix is necessary.

Extensions of briefing deadlines are not favored by the Court and are granted only for good cause stated in writing. Requests for extensions must be received by the Court before the expiration of the deadline.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON

DEFENDANT

FINAL DECREE AND JUDGMENT OF FORFEITURE

On January 6, 1998, a Verified Complaint of forfeiture IN REM against the defendant property was filed on behalf of the plaintiff, United States of America.

It appears that process was fully issued in this action and returned according to law.

That pursuant to a Warrant for Arrest issued by this Court, the United States Department of Treasury posted the defendant real property on August 11, 1998, with copies of the Verified Complaint for Forfeiture and the Warrant for Arrest and Notice IN REM.

On March 27, 1998, April 3, 1998 and April 10, 1998, notice of this action was published in the Laredo Morning Times, a newspaper published in the City of Laredo, Texas.

On February 18, 1998, Attorney Thomas Johnson Jr., received service for Jose A. Lozano of the Verified Complaint of Forfeiture, the Warrant for Arrest and Notice IN REM and the Lis Pedens.

On April 14, 1998, Jose A. Lozano filed a claim in response to the Verified Complaint of Forfeiture.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON

DEFENDANT

CERTIFICATE OF REASONABLE CAUSE

This cause comes before the Court upon Plaintiff's Motion for a Certificate of Reasonable Cause. Having reviewed the records in this case, the Court hereby finds, pursuant to28 U.S.C. § 2465, that there was reasonable cause for this forfeiture action, and accordingly, it is

ORDERED, ADJUDGED, and DECREED that the United States of America had reasonable cause for initiating and prosecuting this forfeiture action and this Order shall constitute a Certificate of Reasonable Cause for the purposes of 28 U.S.C. § 2465,

This the 15th day of March, 2000.

"s/ William L Osteen
UNITED STATES DISTRICT JUDGE "

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON

DEFENDANTS

MOTION FOR A CERTIFICATE OF REASONABLE CAUSE

The Plaintiff, United States of America, by and through its attorney, Walter C. Holton, Jr., hereby moves the Court, pursuant to 28 U.S.C. § 2465, for the issuance of a Certificate of reasonable Cause. In support of this Motion, the plaintiff provides the following:

1. The plaintiff filed a Verified Complaint of Forfeiture In Rem in this case.
2. Title 28, U.S.C. § 2465, provides, in pertinent part, "If it appears that there was reasonable cause for the seizure, the court shall cause a property certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution."
3. It is the Department of justice policy to seek a Certificate of reasonable Cause in all cases to avoid the prospect of future litigation.
4. Based on the Declaration of Special Agent Jack Barnwell, United States Custom Service, attached to the Complaint herein as

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON

DEFENDANT

MOTION FOR FINAL DECREE AND JUDGMENT OF FORFEITURE

Pursuant to Rule 55 (b) (2), Federal Rules of Civil Procedure, the United States of America, respectfully moves this Court for Entry of a Final Decree and Judgment of Forfeiture. This motion is supported by the previously filed Verified Complaint of Forfeiture, Warrant for Arrest, Request to Enter Default, Declaration in Support of Request to Enter Default, Entry of Default, Settlement Agreement and other matters of record. A proposed Final Decree and Judgment of Forfeiture is submitted herewith.

Respectfully submitted,

WALTER C. HOLTON JR.
United States Attorney

"s/ Lynne P. Klauer "

Lynne P. Klauer
Assistant United States Attorney
NCSB #13815
P. O. Box 1858
Greensboro, NC 27402
(336) 333-5351

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO. 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON

DEFENDANT

REQUEST TO ENTER DEFAULT

To: Clerk of the Court

The plaintiff, United States of America, hereby requests that you enter a default, pursuant to Fed.R.Civ P.55(a), against all persons and entities, except Hill Top Farm, Ltd., having an interest in the defendant property for failure to file a claim and an answer or otherwise defend as provided for in Rule C of the Supplemental Rules of Certain Admiralty and Maritime Claims. In support of this Request to Enter Default, the Government submits a Declaration setting forth the facts of the case.This the 11th day of February 2000.

Respectfully submitted

WALTER C. HOLTON JR
United States Attorney

"s/ Lynne P. Klauer "

Lynne P. Klauer
Assistant United States Attorney
NCSB# 13815
P. O. Box 1858
Greensboro, NC 27402
336-333-5351

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOSE ANTONIO LOZANO
DEFENDANT

V

CIVIL NO 1:98CV00011

UNITED STATES OF AMERICA
PLAINTIFF

VIA CERTIFIED

MOTION TO DISMISS CIVIL FORFEITURE ACTION IN REM AND TO WITHDRAW LIEN ON PROPERTY

Now comes the defendant, Jose Antonio Lozano and files this motion and respectfully request to dismiss forfeiture proceedings action against property located at 3714 Cancun Loop Laredo, Texas 78043, Los Presidentes Subdivision and to request to withdraw Lien that was filed in the MIDDLE DISTRICT COURT of the United States on the 6th day of January, 1998 by the United States Attorney for the Middle District of North carolina, against the real property above mentioned. Such document is marked as Civil Action No. 1:98CV 00011.

Declarations of witnesses that participated in the construction of said property in support of this Motion including Bank Statements are attached hereto.

This the 29th day of February 2000

Respectfully submitted,

Jose A. Lozano

Jose Antonio Lozano
Fed. Regs. 19074-057

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOSE ANTONIO LOZANO
DEFENDANT

V

CIVIL NO 1:98CV00011
VIA CERTIFIED

UNITED STATES OF AMERICA
PLAINTIFF

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CIVIL FORFEITURE IN REM AND TO WITHDRAW LIEN ON PROPERTY

STATEMENT OF THE CASE

I, Jose Antonio Lozano, duly swear under oath that the foregoing statement hereafter to be true and correct to the best of my knowledge.

On or about January 6, 1998, the United States District Court for the Middle District of North Carolina filed a verified Complaint for Forfeiture IN REM alleging that the real property located at 3714 Cancun Loop, Laredo, Texas 78043, Los Presidentes Subdivision, situated in Webb County, was used or intended to be used in any manner or part to commit or to facilitate drug offenses or constitutes proceeds traceable to the exchange of a controlled subject to forfeiture to the United States pursuant to 21 U.S.C.S. 881, and was involved in transaction or attempted transaction in violation of 18 U.S.C. §§ 981, 1956 and/or 1957.

The warrant for arrest of real property, was filed based on the declaration of jack H. Barnwell, Special Agent, United States Customs and jeff Smith I.R.S. Special Agent. (See exhibit "A")

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOSE ANTONIO LOZANO
DEFENDANT

V

CIVIL NO.1:98CV00011

UNITED STATES OF AMERICA
PLAINTIFF

REQUEST TO "ORDER" PLAINTIFF TO RESPOND OBJECTION OF DEFENDANT

This cause having come before this court upon motion of United States Attorney for the Middle District of North Carolina to Request to Enter Default, and upon request of Jose Antonio Lozano, Defendant, to "Order" Plaintiff to respond objections , and the defendant being of the opinion that this Request to Enter Default should not be granted and that the defendant's request to "Order" Plaintiff to Respond Objections should be ORDERED.

IT IS THEREFORE A REQUEST, that Plaintiff's Motion to Request to Enter Default should be denied, and that the United States District Attorney shall answer defendant's objection.

DECLARATION IN SUPPORT OF REQUEST TO "ORDER" PLAINTIFF TO RESPOND OBJECTIONS OF DEFENDANT

In support of this request, defendant Jose Antonio Lozano, and representing the property located at 3714 Cancun Loop, Laredo, Texas 78043, respectfully, states that it is awaiting the response of defendant's objections.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO. 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON
DEFENDANTS

DECLARATION IN SUPPORT OF
REQUEST TO ENTER DEFAULT

1. I am an Assistant United States Attorney and represent the plaintiff, United States of America, in this action.
2. A Verified Complaint of Forfeiture was filed on January 6, 1998.
3. Pursuant to a Warrant for Arrest of property issued by this Court on January 22, 1998, all persons interested in the defendant property were required to file their claims with the Clerk of the Court within ten (10) days of the execution of the Warrant, publication of the Notice of Arrest, or actual notice of this action, whichever occurred first, and to serve their answer within twenty (20) days after the filing of their claim.
4. The United States Department of Treasury for the Middle District of North carolina seized said property on March 10, 1998, and notice of said forfeiture action and arrest was published on march 27, April 3, and April 10, 1998, in the Laredo Morning Times, a newspaper published in Webb County, Texas.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO 6:96CV00223

3714 CANCUN LOOP, WEBB COUNTY,
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON
DEFENDANT

MOTION TO STRIKE CLAIM

Now comes Plaintiff, United States of America, by and through Walter C. Holton Jr., United States Attorney for the Middle District of North Carolina,, and moves the Court, pursuant to Fed. R. Civ.P. 37(b), to strike the claim filed in this action by Jose A. Lozano, for failure to comply with the court's order that he respond to plaintiff's discovery requests made pursuant to Rules 33 and 34 of the Federal Rules of civil Procedure. A memorandum of law in support of this motion including Government Exhibits (GE) A-D is attached hereto.

This the 11th day of August 1999.

Respectfully submitted,

WALTER C. HOLTON JR
United States Attorney

"s/ Lynne P. Klauer "

Lynne P. Klauer NCSB#13813
Assistant United States Atty
P.O. Box 1858
Greensboro NC 27402
336-333-5351

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL
APPURTENANCES AND IMPROVEMENTS
THEREON

DEFENDANT

MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE CLAIM

Statement of the Case

This is a civil forfeiture action brought by the United States against the defendant real property alleging that the property was used or intended to be used in any manner or part to commit or to facilitate drug offenses or constitutes proceeds traceable to the exchange of a controlled substance and is, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881, and was involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 981, 1956 and/or 1957.

On February 18, 1998, the claimant, Jose Antonio Lozano ("Claimant") received personal service by the United States Customs Service of the Verified Complaint of Forfeiture and the Warrant for Arrest and Notice in rem. On April 14, 1998, Claimant filed a claim to the defendant real property pro se. Claimant asserted that he is entitled to the defendant real property because he paid for the house legally.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP
LAREDO, TEXAS 78043
WEBB COUNTY,
DEFENDANT

V civil no 1:98CV00011

UNITED STATES OF AMERICA
PLAINTIFF

RESPONSE TO THE MOTION TO STRIKE CLAIM AND REQUESTING MORE TIME TO ANSWER INTERROGATORIES

STATEMENT OF THE CASE

On or about April 12, 1998 I received service of the verified complaint of forfeiture and the warrant for arrest for my property. At the time I was in custody at the Alligator County Jail in Sparta, N.C. I received these documents through my Attorney Mr. Thomas H. Johnson Jr. (See doc #A)

After I received these documents, I conferred with my Attorney, Mr. Johnson and he said that he was going to revise them and let me know what my next step should be. He also wanted me to get some information on the property in order for him to tell me if he would represent me.

On or about April 15, I responded to the notice of forfeiture accordingly within 20 days as prescribed by law. (See doc.#B).

On April 22, 1998 I received a letter from Mr. Johnson stating that it was out of his authority under the Criminal Justice act to represent me in my Civil case. Contradicting what he had told me earlier, he also advised me that I should hire an Attorney from Texas or North Carolina(see doc.#C)

APPENDIX N

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DIVISION

UNITED STATES OF AMERICA
PLAINTIFF

V CASE NO 1:98CV00011

3714 Cancun Loop
Defendant

ORDER

In this action, claimant has filed a document captioned Letter Motion for Appointment of Counsel. Upon review, the document is found to be deficient in the following aspects:

Lacks an original signature Rule 11 F.R.C.P.

X Lacks a certificate of Service Rule 5 F.R.C.P.

Lacks the signature of a member of this court's bar. Local Rule 83.1(c). If the document was signed by an N.C. attorney who is not admitted to the Middle District of North carolina, that attorney's appearance will not be entered in the case until admission to this court. Therefore, no future mailings from this court will be sent until admission.

Lacks the attorney's address, phone number or State Bar number Local Rule 7.1(c)

Is not on letter size paper Local Rule 7.1(a)

X Is not double spaced. Local Rule 7.1(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3714 CANCUN LOOP, WEBB COUNTY	§	
LAREDO, TEXAS (JOSE A. LOZANO)	§	
Defendant,	§	
v.	§	
	§	Case No. 1:98CV00011
UNITED STATES OF AMERICA	§	
PLAINTIFF.		

DEFENDANT'S CLAIM FOR PROPERTY

Motion for an extension of time does not show good cause, consultation with and views of opposing parties. Local Rule 6.1(a).

Motion not accomplished by a supporting brief. Local Rule 7.3(a).

Exceeds the page limitation for brief or reply without prior approval. Local Rule 7.3(d).

Discovery motion does not contain statement of personal consultation. Local Rule 26.1(c).

Seeks relief for a state prisoner pursuant to 42 U.S.C. 1983 and is not on forms required by the court. Local Rule 7.1(e).

Does not comply with Federal Rule of Civil Procedure 41, in that an answer or a motion for summary judgment has been filed; thus, a dismissal may be taken only with leave of court or agreement of opposing counsel.

X Caption does not identify the nature of the document. Fed. R.Civ.P. 7(b)(1).

The document is hereby stricken without prejudice to the filing of a proper document(s) on or before May 18, 1998. Opposing parties need not respond to this document and the Court will not consider it. The response times of opposing parties to any corrected document will run from the date of any corrected filing. In the event that the document is not corrected and refiled, no response is necessary.

SO ORDERED this 4th day of May 1998

"s/ "

United States Magistrate Judge

LEGAL NOTICE

UNITED SATES DISTRICT COURT
IN THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS, WITH ALL APPURTENANCES
AND IMPROVEMENTS THEREON

NOTICE OF FORFEITURE

In obedience to a Warrant of Arrest to be directed, in the above-entitled cause, I have arrested the following described real property:

3714 Cancun Loop, Webb County, Laredo, Texas, with all appurtenances and improvements thereon.

For the causes set forth in the libel now pending in the United States District Court for the Middle District of North Carolina, I hereby give notice to all persons claiming the said described defendant real property, or knowing or having anything to say why the same should not be condemned and forfeited and the proceeds thereof distributed according to the prayer of the libel, that they must file their claims pursuant to Rule C of the Supplemental Rules of Certain Admiralty and Maritime Claims within ten (10) days from the date of publication of this Notice.

APPENDIX O

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY
LAREDO, TEXAS WITH ALL
APPURTENANCES AND IMPROVEMENTS THEREON
DEFENDANT

VERIFIED COMPLAINT OF FORFEITURE

Now comes the plaintiff, United States of America, by and through Walter C. Holton Jr., United States attorney for the Middle District of North Carolina, and respectfully states as follows:

1. This is a civil action in rem brought to enforce the provisions of 21 U.S.C. § 881 for the forfeiture of the aforesaid defendant real property which was used or intended to be used in any manner or part to commit or to facilitate the commission of violations of the Controlled Substances Act 21 U.S.C. §§ 801 et seq. punishable by more than one year's imprisonment, or which constitutes proceeds traceable to the exchange of controlled substances in violation of the Controlled Substances Act.

2. This action is also brought to enforce the provisions of 18 U.S.C. § 981 for the forfeiture of the aforesaid defendant real property which was involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 and/or 1957, or which represents the proceeds of or property traceable to such property used in violation of 18 U.S.C. §§ 1956 and/or1957.

3. This Court has jurisdiction over this matter by virtue of 28 U.S.C. §§ 1345 and 1355.

DECLARATION

I, Jack H. Barnwell, depose and state that I am a Special Agent with the United States Customs Service and have been so employed in that capacity since June 1974. My duties have included investigations of controlled substances, drug conspiracies, and money laundering. I have conducted or assisted in numerous investigations of this type of alleged criminal violations.

United States Customs, IRS CID, and the Albemarle Police Department have been investigating the money laundering/marijuana smuggling organization of Jose Antonio LOZANO (Tony LOZANO) and John PAULETTE, et al, since May 1996.

In October 1997, Tony LOZANO was interviewed by IRS Special Agent Jeff Smith and the Declarant regarding his money laundering/marijuana smuggling activities with John PAULETTE, et al. During this interview, Tony LOZANO stated that he lived at 3714 Cancun Loop, Laredo, Texas. LOZANO stated that he had built the house himself, and that he had used a portion of the proceeds from his marijuana dealings to purchase some of the building materials. Investigation has revealed that from June 1995 through May 1996, Tony LOZANO and John PAULETTE have made approximately seven (7) shipments of marijuana totaling approximately 700 pounds from Laredo, Texas to Albemarle, North Carolina. LOZANO was also arrested in the Summer of 1997 after delivering approximately 300 pounds of marijuana to an undercover detective in Long island, New York.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V CIVIL NO 1:98CV00011

3714 CANCUN LOOP, WEBB COUNTY LAREDO, TEXAS WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON
DEFENDANT

WARRANT FOR ARREST OF REAL PROPERTY AND NOTICE IN REM

TO: THE UNITED STATES MARSHALL AND/OR OTHER AUTHORIZED FEDERAL LAW ENFORCEMENT AGENT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Whereas, a Verified Complaint for Forfeiture InRem was filed in the Middle District Court of the United States on the 6th day of January 1998, by the United States Attorney for the Middle District of North Carolina, against the real property described herein, and for the reasons and causes mentioned in said Complaint.

Whereas, the government is not seeking the immediate seizure of the defendant real property and the Court will defer ruling on whether there is probable cause to forfeit the defendant real property.

NOW, THEREFORE, for the reasons and causes mentioned in said Complaint, and praying that the usual process of the Court be had, and that all persons having any right, title or interest therein may be cited to appear and answer all the matters herein propounded, and that this Court will order and decree the condemnation and forfeiture of the said defendant real property and will order the disposition of said property.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA
PLAINTIFF

V

CIVIL NO 1:98Cv00011

3714 CANCUN LOOP WEBB COUNTY
LAREDO, TEXAS WITH ALL
APPURTENANCES AND IMPROVEMENTS THEREON
DEFENDANT

LIS PENDENS

NOTICE IS HEREBY GIVEN that the foregoing action has been commenced by the plaintiff and is now pending in the United States District Court for the Middle District of North Carolina against the above named property for arrest and forfeiture of the defendant real property pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881. Such Complaint has been duly filed with the Clerk of the United States District Court for the Middle District of North Carolina, Greensboro, North Carolina, on January 9, 1998. Such document is marked as Civil Action No 1:98CV 11.

The defendant property is located at 3714 Cancun Loop, Webb County, Laredo, Texas with all appurtenances and improvements thereon and is more particularly described as follows:

Situated in Webb County, Texas and being THE SURFACE ONLY of Lot(s) 34,in Block 10, Los Presidentes Subdivision, Unit VI as per plat of record in Volume 11, Page 18, of the Plat Records of Webb County, Texas.

The record title holder of the subject real property is JOSE ANTONIO LOZANO. The property was acquired by LOZANO on or about April 30, 1993, from HILL TOP FARM,LTD. For further information concerning the action for forfeiture, reference may be had to the records.

BEST AVAILABLE COPY